# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1930**

## No. 333

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., ETC., APPELLANTS,

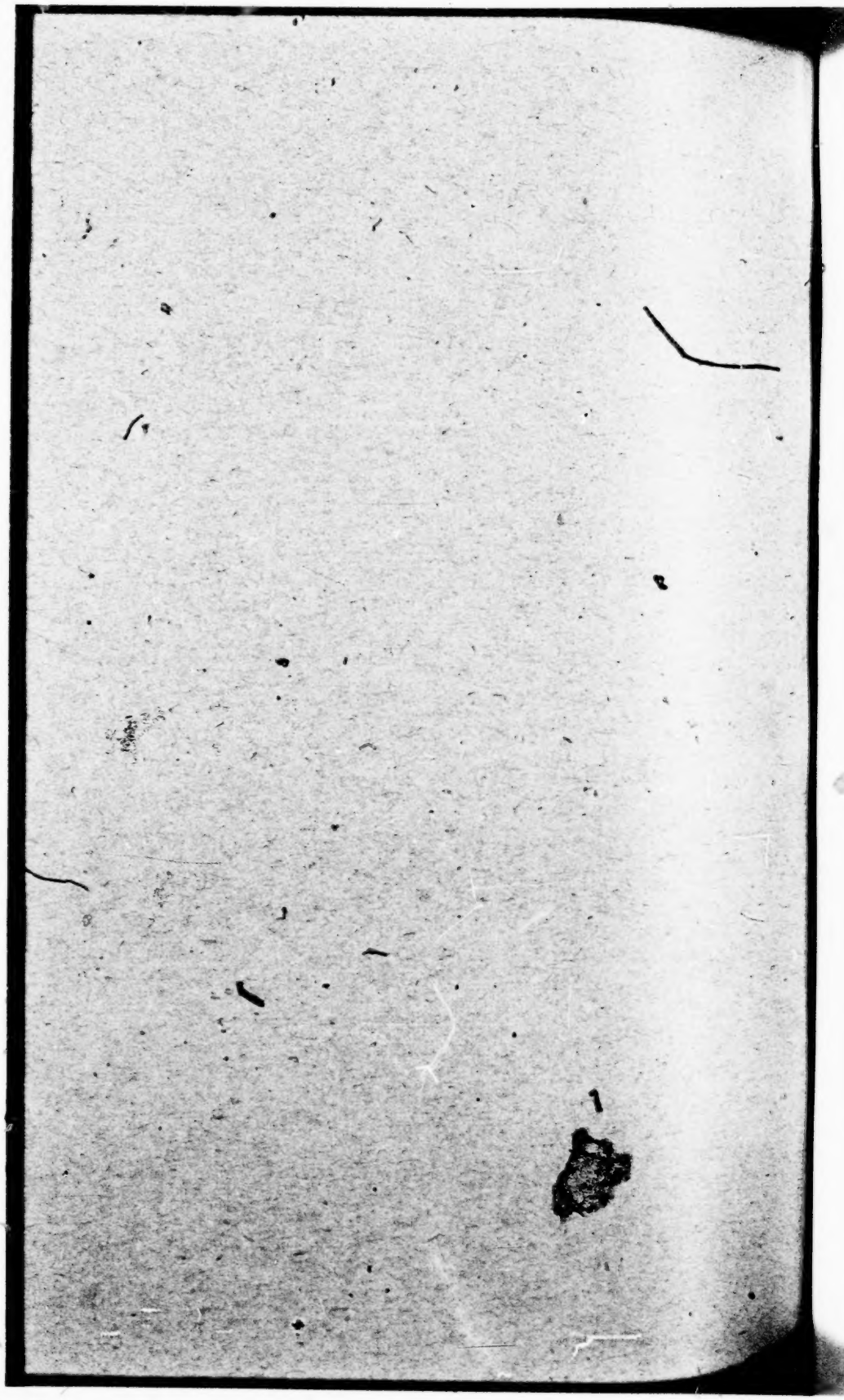
*vs.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND J. W. CAMMACK, ATTORNEY GENERAL OF THE STATE OF KENTUCKY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

**FILED AUGUST 5, 1930**

**(35,255)**



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[fols. a & 1 & 2] [Caption omitted]

[fol. 3]

## IN UNITED STATES DISTRICT COURT, WESTERN KENTUCKY

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Who Sue, etc., Petitioners,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed Dec. 14, 1929

To the Honorable the Judges of said District Court:

Your petitioners, Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, all duly created and organized corporations, who sue on behalf of themselves and of all other carriers subject to the Interstate Commerce Act which may have an interest in the premises, bring this action against the United States of America and the Interstate Commerce Commission, hereinafter called Commission, for the purpose of enjoining, setting aside, annulling and suspending a certain order of the Commission made and entered on the 4th day of November, Anno Domini 1929, in a proceeding by the Commission, not upon the petition of any party [fol. 4] but on its own motion, designated on the Docket of the Commission as "No. 17757. In the Matter of Use of Private Passenger Train Cars," and also an order made by said Commission, on its own motion and not on petition of any party, on the 30th day of July, 1929, amending its Pass Regulations as hereinafter stated.

The petitioners respectfully set forth and allege the following facts as constituting their cause of action.

1. The petitioners are all common carriers by railroad subject to the Interstate Commerce Act and operate lines

of railroad and perform transportation service in the Western District of Kentucky and elsewhere. The Louisville & Nashville Railroad Company, one of said petitioners, has its principal office and its principal operating office in the City of Louisville in the Western District of Kentucky and is a corporation of said State.

Your petitioner, the Illinois Central Railroad Company, is a corporation of and a citizen of the State of Illinois; your petitioner, the Baltimore & Ohio Railroad Company, is a corporation of and a citizen of the State fo Maryland; your petitioner, the Chesapeake & Ohio Railway Company, is a corporation of and a citizen of the State of Virginia; your petitioner, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is a corporation of and a citizen of the State of Ohio.

2. On the 7th day of December, in the year 1925, the Commission, on its own motion, instituted an investigation into and concerning the use of private passenger train cars, including so-called office cars, in the transportation of persons, with a view of making such order or orders in the premises as might be deemed by it warranted.

3. On the 23d day of July, 1928, a Proposed Report in said proceeding was submitted to the Commission, and was served upon petitioners and all other carriers, and sixty days from the date of the service thereof were allowed for the filing of exceptions, which time was afterwards extended so as to include December 22, 1928. On the last mentioned date, exceptions were filed by the Association of Railway Executives, on behalf of its membership, which [fol. 5] at that time comprised, and now comprises, substantially all of the Class I railroads in the United States as such roads are classified by the Interstate Commerce Commission, which represent about 97 per cent of the railroad transportation revenues and about 91 per cent of the railroad mileage in the United States; and argument was duly heard thereon. Whereupon, on the 14th day of March, 1929, the matter was submitted to the Commission and was decided on June 21, 1929.

4. On the 4th day of November, A. D., 1929, the Commission entered an order in the case, a copy of which, marked Exhibit A, is herewith filed as a part of this petition, re-

quiring the carriers named in the list attached thereto, on behalf of which carriers exceptions were filed and argument heard and on whose behalf a waiver of further hearing was expressly made, among which were included your petitioners, to cease and desist, on or before January 15, 1930, and thereafter to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates. A copy of the report of the Commission on which said order was based is also filed herewith, marked Exhibit B, as a part of this petition.

5. By said order your petitioners and a large number of other carriers subject to the Interstate Commerce Act are prohibited from transporting or moving, in the Western District of Kentucky and in all other parts of the United States, private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates under any conditions or circumstances whatever.

6. Each of your petitioners is, and all other carriers subject to the Interstate Commerce Act are, authorized by paragraph (7) of section 1 of the Interstate Commerce Act to issue interstate free tickets, free passes, or free transportation for passengers who are its own employees, and their families, its officers, agents, surgeons, physicians and attorneys at law and to other persons mentioned in that paragraph, and to interchange with other carriers passes for their officers, agents and employees and their families, and to carry free any passengers with the object of pro-
[fol. 6] viding relief in cases of general epidemic, pestilence or other calamitous visitation. By section 22 of said Act they are likewise authorized to give free carriage to their own officers and employees and to exchange passes or tickets with other railroad companies for their officers and employees.

Under and pursuant to the authority thus conferred by law, each of your petitioners has issued, and there are now outstanding in the hands of persons lawfully entitled to use the same, interstate free tickets, free passes or other evidences entitling the holder to free transportation over the lines of your several petitioners in the Western District

of Kentucky and elsewhere, which, in the case of each of your petitioners, was given by it in exchange for similar interstate free tickets, free passes or other evidences of the right to free transportation issued by other carriers to its officers or employees entitled under the law to use such free transportation.

7. Your petitioners are advised that a carrier is not a common carrier of the business or private cars owned by another carrier when they are used by the former as instruments or facilities of its own transportation service, and is not acting as a common carrier of such cars in moving the the same when occupied by a person entitled to use and using free transportation, to any greater or different extent than of, or when moving, its own cars in the same service; and that it is the right of the carrier issuing the free pass, free ticket or other evidence of such free transportation as above mentioned, to transport free over its line persons lawfully holding such free passes, free tickets or other evidence of free transportation; and, in the event of the carrier's undertaking to do so, it becomes its duty to provide itself with, and to furnish, facilities and instrumentalities to transport such persons on and over its line. The law does not impose a limitation on the character of the transportation, nor upon the facilities and instrumentalities, that may be furnished. It may be in any vehicle which is safe and suitable for the purpose and which the carrier making the movement may select and provide. There is likewise no limitation imposed by law to prevent such carrier from accepting or securing from another carrier the vehicle in [fol. 7] which such transportation service is to be furnished nor as to the terms on which such vehicle may be secured. In the event the transportation is furnished in a vehicle not belonging to the carrier, but accepted or secured on terms satisfactory to it from another, such vehicle is not property of a shipper, in the sense contemplated by the statute requiring the filing of tariffs for the transportation of property, but becomes, pro hac vice and for the purpose of such movement, the property of the carrier making the movement and rendering the service. Your petitioners are further advised, and hereby allege, that the service of moving a car owned by another carrier when occupied by persons entitled to use, and using, free transportation, is not

performed for the other carrier, but is performed as a part of its own services in the transportation of passengers holding the free transportation which, under the law, they are permitted to have and use.

8. Your petitioners further show that, in any event, it is also lawful, under the provisions of the statute permitting free transportation in certain cases, for a carrier subject to the Act to handle free the car of another such carrier as an incident of such free transportation.

9. Your petitioners further show that the practice of moving persons entitled to use, and using, free transportation in the private or business car of another carrier free and without imposing any charge for the movement of the car has existed from the earliest days of steam railroads and was generally known to exist at the time of the original enactment by Congress of the Interstate Commerce Act and at the time of each of the amendments made thereto; and neither in the original Act nor in any subsequent amendment is there contained any prohibition against the practice, but, on the contrary, Congress has itself, as hereinafter shown, sanctioned and adopted the interpretation of said laws whereby the said practice was so recognized as lawful.

10. Moreover, the practice referred to has always been well known to the Commission and both impliedly and expressly was recognized by it as lawful up to the time of the report in this proceeding. Paragraph (6) of section 1 of the Interstate Commerce Act provides:

[fol. 8] It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs. • • •

This has, in effect, always been in the Interstate Commerce Act, but was specifically added in the amendment of June 18, 1910, and has continuously since been a part of said Act.

Paragraph (1) of section 6 provides and has always provided:

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established.

No tariff such as is referred to in said provisions of the law, covering the movement by one carrier subject to the Interstate Commerce Act of the private or business cars of another such carrier when occupied by a person entitled to use and using free transportation, has ever been filed with the Commission, as the Commission has well known, and no requirement was ever made by the Commission, up to the time of its order in this proceeding, that any such tariff should be filed.

Moreover, both the Conference Rulings of the Commission up to the time that the Conference Rulings were rescinded by an order entered on the 26th day of December, 1928, and its Pass Rgulations, up to the time of and until after the report in this proceeding, contained an express recognition of the lawfulness of the practice referred to and, in fact, prescribed the form of a pass, which would be [fol. 9] recognized by the Commission as lawful, for the car, as well as for the occupant, in case such occupant, using and entitled to use free transportation, was transported in the car of another carrier. The form so prescribed was as follows:

Pass John Smith, President, car, and five officers and employees of the X. Y. Z. Railway Company—

the X. Y. Z. Railway Company being a carrier other than the carrier issuing the pass, and your petitioners further show that after the adoption and promulgation of the regulations aforesaid by the Commission under and by virtue of sections 1 and 22 of the Interstate Commerce Act, Congress reenacted the said sections and thereby itself ratified and adopted the interpretation of said sections under and

by virtue of which the said regulations were adopted and promulgated as aforesaid.

A copy of the order above mentioned, of the 26th day of December, 1928, rescinding its Conference Rulings, is herewith filed as a part of this petition, marked Exhibit C. In said order the Commission stated that its action in rescinding its Conference Rulings was taken without reference to the correctness of the individual rulings.

On the 30th day of July, 1929, after the final report in this proceeding, the Commission entered an order changing its previous Pass Regulations, which were then as above stated, by adding the following:

A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operating as a part of the same system. See In the Matter of the Use of Private Passenger Train Cars, 155, I. C. C., 775.

which reference is to the report of the Commission in this proceeding. A copy of said order of the Commission made on the 30th day of July, 1929, is herewith filed, marked Exhibit D, as a part of this petition.

[fol. 10] By paragraph (8) of section 16 of the Interstate Commerce Act, heavy pecuniary penalties are imposed on any carrier, as well as on its officers, representatives or agents, who knowingly fail or neglect to obey any such order of the Commission as that entered by it, as hereinbefore alleged, on the 4th day of November, 1929, and as that entered by it as aforesaid on the 30th day of July, 1929, to-wit, a forfeiture to the United States of the sum of five thousand dollars for each offense, every distinct violation being defined as a separate offense and, in case of a continuing violation, each day to be deemed a separate offense.

11. The United States of America is made defendant in this suit pursuant to the mode of procedure prescribed in the Commerce Court Act (36 Stat. L. 539), approved June 18, 1910, which procedure must be followed in the District Court pursuant to the requirements of the District Court Jurisdiction Act, being part of the Urgent Deficiency Ap-

propriations Act (38 Stat. L. 219), approved October 22, 1913.

The Commission is an administrative tribunal created by the Interstate Commerce Act and is specifically charged with the administration and enforcement of the provisions of said Act.

12. Your petitioners further show that said report of the Commission and its said order of November 4, 1929, and its said order of July 30, 1929, are erroneous, are not authorized by law and are invalid in so far as they or either of them undertakes to declare unlawful and to forbid the transportation or movement by a carrier subject to the Interstate Commerce Act of the private passenger cars, including so-called office cars, owned by another such carrier free or at other than published tariff rates when occupied by a person using and lawfully entitled to use free transportation or to declare unlawful and to forbid accessorial transportation or movement of such cars in connection with or as incidental to such free transportation service; and the effect of said orders, if enforced, would be to deprive your petitioners and other carriers similarly situated of the right to make a lawful use of their respective properties, and consequently to deprive them of their properties with- [fol. 11] out due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

Wherefore your petitioners pray:

1. That the United States of America and the Interstate Commerce Commission be made parties defendant to this petition and that subpœnas in chancery issue out of and under the seal of this honorable Court, directed to the defendants, as required by law, and that due and proper service of such process and of this petition be forthwith made by filing a copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, as in said District Court Jurisdiction Act provided, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpœnas or notices, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

2. That a temporary or interlocutory injunction be entered herein, restraining, enjoining and suspending, until the further order of this Court, the effect and enforcement of said orders of the Commission in so far as they are hereinbefore complained of as illegal.

3. That after final hearing this Court adjudge, order and decree that said finding of the Commission and its said orders are and have at all times been beyond the lawful authority of the Commission in so far as they or either of them undertakes to declare unlawful and to prohibit the transportation or movement free and without charge by one carrier subject to the Interstate Commerce Act of the private or business car of another such carrier when occupied by a person using and lawfully entitled to use free transporfation, or undertakes to declare unlawful and to prohibit accessorial transportation or movement of such car in connection with or as incidental to such free transportation service; and that said orders, to the extent herein complained of as unlawful, be perpetually set aside, suspended and annulled, and the enforcement thereof perpetually enjoined.

4. That your petitioners and each of them may have such other and further relief in the premises as in equity and justice they are entitled to receive and as may be deemed by this honorable Court to be adequate and proper under the circumstances.

[fol. 12] And, as in duty bound, your petitioners will ever pray, etc.

Louisville & Nashville Railroad Company, by W. R. Cole; Illinois Central Railroad Company, by L. A. Downs; The Baltimore & Ohio Railroad Company, by Daniel Willard; The Chesapeake & Ohio Railway Company, by Jerry J. Bernet; Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by P. E. Crowley; Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Alfred P. Thom, Jr., Counsel and Solicitors.

[fol. 13] *Duly sworn to by* W. R. Cole. *Jurat omitted in printing.*

[fol. 14] EXHIBIT "A" TO PETITION

## Order

At a general Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of November, A. D. 1929

No. 17757

In the Matter of Use of Private Passenger Train Cars

It appearing that, in compliance with the statute in such case made and provided, this commission, upon its own motion, entered into an investigation into and concerning certain questions arising under sections 2, 3, 6 and 22 of the Interstate Commerce Act as to the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Act by another such carrier free or at other than published tariff rates, and relating to the enforcement of the foregoing provisions of the Act in that regard; and

It further appearing that a full investigation of the matters and things involved was had, in the course of and pursuant to which a proposed report was submitted to the Commission, whereupon the carriers named in the list hereto attached appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had; and

It further appearing that on the 21st day of June, 1929, this commission after full consideration overruled said exceptions and made and filed a report containing its conclusions thereon, which report is hereby referred to and made a part hereof, and therein decided:

1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;

2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while

charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and

3. That the transportation of persons in such private passenger cars, including berth and other accommodations, [fol. 15] at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial.

In its report the commission declared that no order appeared to be necessary. On further and subsequent consideration, however, the commission is of opinion that an order in the premises is proper and appropriate, and, the exceptants to the said proposed report having appeared before the commission and expressly waived any further hearing in the premises,

It is ordered that the carriers named in the list hereinbefore referred to and attached hereto, on behalf of which such exceptions were filed and argument heard and on whose behalf a waiver of further hearing has been expressly made, be, and each of them hereby is, notified and required to cease and desist, on or before January 15, 1930, and thereafter to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates.

And it is further ordered that this order shall continue in force until the further order of the commission.

By the commission, George B. McGinty, Secretary.

(Seal.)

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[fol. 16] Association of Railway Executives

Member Roads

Abilene & Southern Railway Company.
The Akron, Canton & Youngstown Railway Company
The Ann Arbor Railroad Company
Manistique and Lake Superior Railroad Company
The Atchison, Topeka and Santa Fe Railway Company
Beaumont Wharf and Terminal Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company

Atlanta and West Point Railroad Company
Atlanta, Birminigham and Coast Railroad Company
Atlantic Coast Line Railroad Company
The Baltimore and Ohio Railroad Company
The Baltimore and Ohio Chicago Terminal Railroad Company
Dayton and Union Railroad Company
The Staten Island Rapid Transit Railway Company
The Sharpsville Railroad Company
Bangor and Aroostook Railroad Company
Van Buren Bridge Company
Bessemer and Lake Erie Railroad Company
Boston and Maine Railroad
Buffalo & Susquehanna Railroad Company
Buffalo, Rochester and Pittsburgh Railway Company
Canadian National
Grand Trunk Western Railway Company
Atlantic and St. Lawrence Railroad Company
Chicago, Detroit and Canada Grand Trunk Junction Railroad Company
Cincinnati, Saginaw and Mackinaw Railroad Company
Detroit, Grand Haven and Milwaukee Railway Company
Duluth, Winnipeg and Pacific Railway Company
Grand Trunk Western Railway Company
Michigan Air Line Railway
The Pontiac, Oxford and Northern Railroad Company
St. Clair Tunnel Company
Toledo, Saginaw and Muskegon Railway Company
Canadian Pacific Railway
Canadian Pacific Lines in Maine
Canadian Pacific Lines in Vermont
[fol. 17] Central of Georgia Railway Company
Wadley Southern Railway Company
Wrightsville and Tennille Railroad Company
The Central Railroad Company of New Jersey
Central Vermont Railway Company
The Chesapeake and Ohio Railway Company
The Chicago and Alton Railroad Company
Chicago and Eastern Illinois Railway Company
Chicago and Illinois Midland Railway Company
Chicago and North Western Railway Company

Chicago and Western Indiana Railroad Company
Chicago, Burlington & Quincy Railroad Company
Quincy, Omaha & Kansas City Railroad Company
Chicago Great Western Railroad Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
The Chicago, Rock Island and Pacific Railway Company
The Chicago, Rock Island and Gulf Railway Company
Chicago, Saint Paul, Minneapolis and Omaha Railway Company
Clinchfield Railroad Company
The Colorado and Southern Railway Company
Cumberland and Pennsylvania Railroad Company
The Delaware and Hudson Company
Greenwich & Johnsonville Railway Company
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Denver and Salt Lake Railway Company
Detroit, Toledo and Ironton Railroad Company
The Duluth, South Shore and Atlantic Railway Company
Mineral Range Railroad Company
Erie Railroad Company
Chicago and Erie Railroad Company
The New Jersey and New York Railroad Company
New York, Susquehanna and Western Railroad Company
The Wilkes-Barre and Eastern Railroad Company
Florida East Coast Railway Company
Fort Smith and Western Railway Company
Fort Worth and Denver City Railway Company
Great Northern Railway Company
Farmers' Grain and Shipping Company

[Pol. 18] Gulf Coast Lines:

New Orleans, Texas & Mexico Railway Company
The St. Louis, Brownsville and Mexico Railway Company
The Beaumont, Sour Lake & Western Railway Company
The Orange & Northwestern Railroad Company

New Iberia & Northern Railroad Company
Gulf, Mobile and Northern Railroad Company
The Hocking Valley Railway Company
The Huntingdon and Broad Top Mountain Railroad & Coal Company
Illinois Central Railroad Company
Gulf and Ship Island Railroad Company
The Yazoo and Mississippi Valley Railroad Company
International Great Northern Railroad Company
The Kansas City Southern Railway Company
Texarkana and Fort Smith Railway Company
Lake Superior & Ishpeming Railroad Company
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
The Long Island Railroad Company
Louisiana & Arkansas Railway Company
Louisville & Nashville Railroad Company
Maine Central Railroad Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railroad Company
Minneapolis, St. Paul & Sault Ste. Marie Railway Company
Minnesota and International Railway Company
Missouri Kansas Texas Railroad Company
Missouri-Kansas-Texas Railroad Company of Texas
Missouri Pacific Railroad Company
Natchez & Southern Railway Company
Union Railway Company
Mobile and Ohio Railroad Company
The Nashville, Chattanooga & St. Louis Railway
Nevada Northern Railway Company
New Orleans Great Northern Railroad Company

New York Central Lines:

The Cincinnati Northern Railroad Company
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company
The Muncie Belt Railway Company
Indiana Harbor Belt Railroad Company
Kankakee and Seneca Railroad Company
[fol. 19] The Michigan Central Railroad Company
Chicago, Kalamazoo and Saginaw Railway Company
The New York Central Railroad Company

The Pittsburgh and Lake Erie Railroad Company
Evansville, Indianapolis & Terre Haute Railway Company
The Chicago River and Indiana Railroad Company
Chicago Junction Railway Company
The New York, Chicago and St. Louis Railroad Company
The New York, New Haven and Hartford Railroad Company
New York, Ontario and Western Railway Company
Norfolk & Western Railway Company
Norfolk Southern Railroad Company
Northern Pacific Railway Company
The Gilmore and Pittsburgh Railroad Company, Limited
Northwestern Pacific Railroad Company
The Pennsylvania Railroad Company
Baltimore, Chesapeake & Atlantic Railway Company
Baltimore and Eastern Railroad Company
The Ohio River and Western Railway Company
The Pennsylvania Railroad Company
Waynesburg and Washington Railroad Company
West Jersey and Seashore Railroad Company
Pennsylvania and Atlantic Railroad Company
Pere Marquette Railway Company
The Pullman Company
Reading Company
Atlantic City Railroad Company
Catasqua and Fogelsville Railroad Company
The Gettysburg and Harrisburg Railway Company
The North East Pennsylvania Railroad Company
Perkiomen Railroad Company
The Philadelphia and Chester Valley Railroad Company
The Philadelphia, Newtown and New York Railroad Company
The Port Reading Railroad Company
Reading and Columbia Railroad Company
Stony Creek Railroad Company
Richmond, Fredericksburg and Potomac Railroad Company
The Rio Grande Southern Railroad Company
Rutland Railroad Company
The St. Joseph and Grand Island Railway Company

[fol. 20] St. Louis San Francisco Railway Company
Fort Worth & Rio Grande Railway Company
Paris and Great Northern Railroad Company
Quanah, Acme & Pacific Railway Company
St. Louis, San Francisco and Texas Railway Company
St. Louis Southwestern Railway Company
St. Louis Southwestern Railway Company of Texas
San Antonio, Uvalde & Gulf Railroad Company
Seaboard Air Line Railway Company
Raleigh & Charleston Railroad Company
Tampa Northern Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
Southern Railway Company
The Alabama Great Southern Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railway Company
Georgia Southern and Florida Railway Company
New Orleans and Northeastern Railroad Company
Northern Alabama Railroad Company
Harriman and Northeastern Railroad Company
New Orleans Terminal Company
St. Johns River Terminal Company
Cincinnati, Harrogate & Cumberland River Railway Company
Asheville and Spartanburg Railway Company
Blue Ridge Railway Company
Carolina and Tennessee Southern Railway Company
Danville and Western Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Mocksville and Statesville Railroad Company
Southern and Knoxville Railroad Company
State University Railroad Company
Tennessee and Carolina Southern Railway Company
Yadkin Railroad Company
Spokane, Portland and Seattle Railway Company
Oregon Trunk Railway
United Railways Company
Tennessee Central Railway Company
The Texas and Pacific Railway Company
The Weatherford, Mineral Wells and Northwestern Railway Company
[fol. 21] Toledo, Peoria & Western Railroad Company

The Trinity and Brazos Valley Railway
The Ulster and Delaware Railroad Company
Union Pacific Railroad Company
[illegible] & Salt Lake Railroad Company
Oregon Short Line Railroad Company
[illegible] Railroad & Navigation Company
[illegible] Company
[illegible] Company
[illegible] Company
[illegible]
[illegible] Company
[illegible] Company
[illegible] Railway Company

commodations is unjustly discriminatory and unduly preferential and prejudicial.

Thomas P. Healy for Interstate Commerce Commission.

Alfred P. Thom, Alfred P. Thom, jr., and R. H. Aishton for Association of Railway Executives.

W. H. Lyford for Chicago & Eastern Illinois Railroad Company.

Report of the Commission

McManamy, Commissioner:

Exceptions to the proposed report were filed on behalf of the Association of Railway Executives and the Chicago & Eastern Illinois Railroad Company and oral argument has been had.

This is an investigation instituted on our own motion into and concerning the use of private passenger train cars, including so-called office cars, in the transportation of persons, with a view to making such order or orders in the premises as may be warranted.

A questionnaire was sent to all Class I and II carriers and to switching and terminal carriers, calling for information as to private passenger train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The returns to the questionnaire were so voluminous and the subject matter so diversified that a complete detailed [fol. 23] analysis thereof is impracticable within the limits of this report. Different phases of the subject have been considered generally and particular practices and instances cited as illustrations.

The returns show that a substantial portion of the total mileage of private passenger-train cars, including so-called office cars, herein referred to collectively as private cars, was on the lines of carriers other than those owning the cars. The private cars thus moved over foreign lines were transported without charge. In other words, a pass was issued covering transportation of the private cars similar to that issued for the transportation of certain classes of persons as provided for in sections 1 and 22 of the act.

A general summary of the data included in the returns to the questionnaire is contained in Appendix A, which shows separately for Class I roads, Class II roads, and for switching and terminal roads the number of private passenger cars owned or leased, number of trips, number of occupants holding passes, and the number holding tickets. In Appendix B is contained a statement, by roads, of the mileage of private passenger cars during the years 1923, 1924, and 1925 on home and foreign lines, also of the mileage of foreign cars on home lines. The data submitted by carriers covering movement of foreign cars on home lines do not in some cases agree with the data submitted by the owning carrier covering mileage of cars on foreign lines. These discrepancies are, however, of little importance and no attempt was made toward correction thereof.

It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants. The facilities thus provided for those traveling in private cars exceel the facilities of the ordinary coach or Pullman car.

The returns to the questionnaire show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach. The following instances, which refer to movements of private cars of other carriers over the lines of the Atlantic Coast Line, Atchison, Topeka & Santa Fe,[1] New York Central, and Union Pacific, will illustrate the practices in these respects. The parties indicated were in charge of the cars.

[fol. 24] On the Atlantic Coast Line:

| | Miles |
|---|---|
| 1. Wife of director | 664 |
| 2. Wife of director | 1,327 |
| 3. Wife of chairman of board | 3,000 |
| 4. Wife of vice president | 54 |
| 5. Wife of president | 108 |
| 6. Wife of senior vice president | 340 |

[1] Hereinafter referred to as the Santa Fe.

| | |
|---|---|
| 7. Wife of vice president | 651 |
| 8. Wife of vice president | 389 |
| 9. Wife of vice president | 108 |
| 10. Wife of chairman of board | 274 |
| 11. Widow of deceased president | 1,327 |
| 12. Daughter of chairman of board | 631 |
| 13. Wife of general superintendent | 155 |
| 14. Wife of vice president | 464 |

On the Santa Fe:

| | |
|---|---|
| 1. Wife of president | 2,242 |
| Car deadhead, Los Angeles, Calif., to Chicago, Ill. | 2,227 |
| 2. Widow and son of deceased vice president | 2,242 |
| 3. Widow of deceased director | 1,129 |
| 4. Widow of deceased president | 2,006 |
| Car deadhead to Kansas City, Mo. | 1,791 |
| Car deadhead, Chicago, Ill., to Los Angeles, Calif. | 2,260 |
| 5. Widow of deceased president | 2,260 |
| 6. Wife of president | 2,242 |
| Car deadhead, Los Angeles, Calif., to Chicago, Ill. | 2,242 |
| 7. Wife of vice president | 1,949 |
| Car deadhead, Los Angeles, Calif., to Kansas City, Mo. | 1,790 |
| 8. Widow of deceased director | 1,705 |
| 9. Widow of deceased president | 1,705 |
| Car deadhead, Los Angeles, Calif., to Kansas City, Mo. | |
| 10. Wife of Chairman of board | 2,225 |

On the New York Central:

| | |
|---|---|
| 1. Wife of president | 812 |
| 2. Wife of director | 876 |
| 3. Widow of deceased director | 438 |
| 4. Widow of deceased director (in privately owned car) | 1,314 |
| 5. Wife of vice president | 858 |
| 6. Wife of vice president | 592 |
| 7. Wife of chairman of board | 284 |
| 8. Wife of president | 662 |
| 9. Wife of director | 961 |

On the Union Pacific:

| | |
|---|---|
| 1. Wife of director | 1,550 |
| 2. Wife of president | 2,522 |
| 3. Widow of deceased chairman of board (in privately owned car) | 1,980 |
| 4. Wife of vice president | 507 |
| 5. Widow of deceased vice president | 2,434 |
| 6. Wife of executive vice president | 1,980 |
| 7. Wife of chairman of board | 990 |

On December 9, 1925, Chicago, Rock Island & Pacific car No. 1911 left Chicago, Ill., for Los Angeles, Calif., and return. This car was occupied by the general freight agent of the carrier and by the vice president of the Studebaker [fol. 25] Corporation and wife together with four children and a maid. The mileage of this trip totaled 4,594 miles. On November 8, 1925, the same car traveled from Chicago to Champaign Ill., over the Illinois Central and was occupied by the system freight traffic manager of the carrier, who traveled on a pass, and by 15 other persons holding tickets. The returns to the questionnaire show that "most of these parties were engaged in the coal business."

On May 15, 1925, Pittsburgh & Lake Erie car No. 99 moved over the Louisville & Nashville from Louisville, Ky., to Cincinnati, Ohio. The car was in charge of the assistant to the president, and accompanying him were the following guests using tickets:

Vice president and wife, Standard Steel Spring Company. President and wife, Substance Furnace Company. Official and wife, Severance Manufacturing Company.

There is also a substantial use of private cars, both on home and foreign lines, by directors of carriers. For example, Appendix C shows movements of private cars occupied by directors of the Pennsylvania Railroad. Trips of less than 200 miles on foreign lines are not included nor are trips between Pennsylvania Railroad points such as Chicago and St. Louis, Mo., via the Chicago & Alton included.

Attention is called to the record of movements of private cars occupied by or assigned to a vice president of one of the eastern carriers, which is shown in Appendix D. The

same official is an executive of several other carriers in different parts of the country.

During the three year period the eight private cars of the New York, Chicago & St. Louis[1] traveled 254,814 miles on foreign lines while foreign line cars traveled only 2,[illegible] miles on that line. An analysis of the movements of these eight cars on trips involving both home and foreign lines is contained in Appendix E. These trips included trips to Florida, California, Michigan, Maine, French Lick Springs, Ind., Hot Springs, Ark., and White Sulphur Springs, W. Va. Included among the occupants on numerous occasions were the wives of officials and on other occasions the parties included guests holding tickets.

The movement of private cars to resorts commonly patronized by those seeking recreation or amusement, and located on foreign lines, is very noticeable. For example, the total mileage of private cars of other carriers over the Atlantic Coast Line leading to Florida during the three year period was 456,[illegible], and over the Richmond, Fredericksburg & Potomac was [illegible]. In considering these figure it is to be borne in mind that the latter line is only 116 miles in length. The return of the Maine Central shows that the mileage of foreign private cars over that line was 41,521, which is almost twice the mileage of Maine Central [fol. 26] private cars on its own lines. During the same period private cars of the Maine Central were moved [illegible] 2,028 miles over other lines.

There is also an extensive use of private cars on short lines industrial roads, and [illegible] in the interest of some party other than the [illegible] mileage of private cars used by the latter lines is [illegible] on foreign lines, and in numerous instances the home stations of the cars and the movements thereof are so far removed from the vicinity of the owning road that it is difficult to conceive the circumstances under which such movements could have been in the interest of or connected with the operation of the road owning the car. For example, the private cars of the Interstate Railroad made 4,296 miles on home lines and 21,344 miles on foreign lines, the cars of the

[1] Hereinafter referred to as the Nickel Plate.

Louisiana & Pacific made 167 miles on home lines and 61,046 miles on foreign lines, including travel for the account of the Longview, Portland & Northern; the cars of the Midland Terminal made 113 miles on home lines and 19,027 miles on foreign lines; the cars of the Minneapolis, Northfield & Southern made 160 miles on home lines and 15,058 miles on foreign lines; and the cars of Piedmont & Northern made 2,000 miles on home lines and 73,888 miles on foreign lines.

As a further illustration, attention is called to the situation disclosed with respect to the Louisiana & Pacific. This was one of three sawmill roads which composed the so-called Shreveport, Alexandria & Southwestern system, 91 miles in extent. The roads were owned and operated as subsidiary companies by the Long Bell Lumber Corporation, which has mills and plants in various sections of the country. According to Poor's and Moody's Manuals the following Long Bell Corporation officials are also officers of the subsidiary railways: Chairman, president, two vice presidents, and the secretary and comptroller. The carriers' replies to questions 2 and 3 of the questionnaire are reproduced in order to show clearly the cars and assignments:

Question 2. Statement of business, official, or other private passenger-train cars owned or leased and transported free or at less than published tariff rates during the years 1923, 1924, and 1925:

| Car | Initial | Number or name |
|---|---|---|
| | L. & P. Ry. Co. | Kymokan. |
| | L. & P. Ry. Co. | 100 (Previously Kymokan sold May 8, 1924). |
| | L. & P. Ry. Co. | 101 (Acquired from L. P. & N. Ry. Co., July 15, 1924). |

If assigned, to whom: Unassigned. These cars were owned by Louisiana & Pacific Railway Company which, with the Sibley, Lake Bisteneau & Southern Railway Company and the Woodworth & Louisiana Central Railway Company comprise the "Shreveport, Alexandria & Southwestern Railway System." The cars were used jointly by general officers of these system lines and also by general officers of the Mississippi Eastern Ry. Co. and Longview, Portland &

Northern Railway Company, some of whose officers and directors are also officers and directors of the "Shreveport, Alexandria & Southwestern Railway System" lines.

[fol. 27] Question 3. Home cars on home railroad:

None. Headquarters of car located off lines. Explanation: The business car of these lines is held at Kansas City, Mo., at which point are located the general offices of respondent.

These cars with home station at Kansas City, Mo., the headquarters of the Long Bell Corporation, made 167 miles on home lines and 61,046 miles on foreign lines, while these roads were used for a total of 60 miles by private cars of foreign lines. Most of the trips were made between Kansas City and Longview, Wash. There were several so-called inspection tours which embraced Mississippi, Louisiana, and Texas destinations. The home line mileage on these trips ranged from 5 to 88 miles and the foreign line mileage ranged from 2,500 to 2,559 miles. A list of ticket passengers on the trips of this system's cars, together with the advantages accruing to the families of the officials, indicates the real purpose of the cars. Included among the ticket passengers are the following Long Bell Lumber Corporation officials and employees:

Vice president; Secretary to vice president; Assistant to vice president; General manager of Longview farm and wife; Sales manager of sash and door department; Manager of mercantile department; Mill manager; Second secretary to vice president; Superintendent of construction; Third secretary to vice president; Clerk in mercantile department; Treasurer and wife; Architect; Landscape architect; Advertising manager; Chief clerk; Mill superintendent.

The returns show 65 passages on passes and 55 on tickets. Various members of the families of officials, including maids and valets, comprise a large portion of the travelers on both pass and ticket transportation. A statement of the movements of Louisiana & Pacific private cars on the Union Pacific was taken from the latter's return and is included as Appendix F.

The returns with respect to the Nevada Northern also illustrate how a small road with several private cars and

with important non-car corporate interests makes use of the private car. This road according to Poor's and Moody's Manuals operates 165 miles of broad-gage line in Nevada. The road is owned by the Nevada Consolidated Copper Company, which is controlled by the Utah Copper Company, which in turn is controlled by the Kennecott Copper Corporation. The same interests own or control the Copper River & Northwestern Railway in Alaska. Officers and directors of the Nevada Northern are officers or directors in one or more of the related corporations, namely: Copper River & Northwestern Railway, Nevada Consolidated Copper Company, Utah Copper Company, and Kennecott Copper Corporation. The return of the Nevada Northern shows that the road owns two private cars: one, the N. N. 101, has headquarters on the line at East Ely, Nev., while the other car, N. N. 100, is identified in the returns as follows: "Note: Home station of Nevada Northern 100 is Jersey City, N. J. (Erie Railroad)." This car was used extensively by the president of the Nevada Northern and by the president and vice president of the Copper River & Northwestern. A third car, which was moved extensively on the account of the Nevada Northern, is the car "Cyprus," which, according to the return, is owned by a vice president of that railway. The extent of the travel of cars charged to the Nevada Northern on the Western Pacific, Southern Pacific, and Union Pacific is shown in Appendix G.

The return shows that in most instances the owner of the "Cyprus" traveled as vice president of the Nevada Northern, but at other times he traveled as an official of the Bingham & Garfield. The return of the Ray & Gila Valley in referring to movements of the same official's car, "Cyprus," stated: "We have kept no record of the movements of * * * car on own line and were, therefore, delayed since receipt of your second request in searching out the dates of his semi-annual visits to the property in Arizona." This return also showed with respect to occupation that the official referred to "is the president and active executive in charge of operations of the Jackling-Hayden-Stone group of copper mines and subsidiary railways."

The returns show that a substantial portion of the total mileage of private cars, especially on foreign lines, was

what is commonly referred to as "deadhead" mileage, that is, the cars were not occupied, except in some instances by an attendant. The purpose of the movements is to return the cars to their home stations or to move them to stations where they are to be occupied. On the Baltimore & Ohio and the Michigan Central approximately 3 per cent of the total mileage of foreign private cars was deadhead. On the Cleveland, Cincinnati, Chicago & St. Louis the percentage was 4, on the Spokane, Portland & Seattle 5, on the Boston & Maine over 9, on the New York, Chicago & St. Louis 11, on the Richmond, Fredericksburg & Potomac over 12, and on the Atlantic Coast Line over 16.

The returns show numerous instances where private cars were deadheaded to and from shops for repairs or changes. Also worthy of consideration are the matter of free switching service and free storage for private cars. A large number of the private cars covered by the returns are held at off-line stations without orders. Many are so held at New York and the returns indicate that the matter of storage and switching of these cars is of considerable importance from the standpoint of operating expenditures.

[fol. 29] In numerous cases cars were routed from the Pullman Company by officers of carriers, and such cars were moved without charge by the carriers. The movements of Pullman private cars as stated by railway officials and others over the Union Pacific and New York Central are summarized in Appendix H.

Numerous instances are shown where private cars of the carriers were loaned to officers of other carriers. As an illustration, Missouri Pacific car No. 1 was loaned on May 15, 1925, to the chairman of the board of the Manufacturers Railway for a trip from St. Louis to Louisville. The returns show that this official used a pass and that he was accompanied by seven persons holding tickets. Union Pacific car 101 was used for a trip from New York to Colorado Springs, Colo., during July and August, 1923, and was occupied by the widow and daughter of a former director, holding passes, and by five other persons holding tickets.

Many private cars which were transported free, or at less than tariff rates, are of private ownership as distinguished from carrier ownership. For example, Union Pacific car No. 1900 is owned by the widow of a former chairman of the board of one of the western carriers. Attention

is called to the movement of this car during the period from July 16 to September 3, 1923, as indicated below:

| | | |
|---|---|---|
| July 16, 1923 | Ogden, Utah, to Oakland Pier Calif | |
| July 16, 1923 | Oakland to San Francisco Calif | Deadhead |
| July 17, 1923 | San Francisco to Santa Barbara Calif | |
| July 30, 1923 | Santa Barbara to Los Angeles Calif | Deadhead |
| July 31, 1923 | Los Angeles to Santa Barbara Calif | Deadhead |
| Aug. 14, 1923 | Santa Barbara to Los Angeles Calif | |
| Aug. 15, 1923 | Los Angeles to Santa Barbara Calif | |
| Aug. 29, 1923 | Santa Barbara to Los Angeles Calif | |
| Aug. 29, 1923 | Los Angeles to Santa Barbara Calif | Deadhead |
| Sept. 1, 1923 | Santa Barbara to San Francisco Calif | |
| Sept. 1, 1923 | San Francisco to Oakland Pier Calif | Deadhead |
| Sept. 3, 1923 | Oakland Pier, Calif., to Ogden Utah | |

The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the lines and which used for that purpose are an important factor in carrying on the business of the road. It is seldom, however, that these duties necessitate a movement of the car over other lines. In some cases such a movement may be justified for business reasons, for example, where it avoids a reverse movement over the home line. But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These and other [fol. 30] abuses are apparent from the returns, but we are here concerned primarily with the legality of the free trans-

It was contended on behalf of the express companies that the custom of the express companies to exchange franks was one of long standing and presumably known to Congress, and that there was no record of any protest against it to or by this commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. On the other hand, it was contended for the United States that the only section of the interstate commerce act which relates to the carriage of property free or at reduced rates is section 22, and that there is nothing in it which by any possible construction can be taken as covering the granting or interchanging of franks, applying to the transportation of property by the express companies.

In disposing of the case and in affirming the decrees of the lower court the Supreme Court said:

We are clearly of the opinion that, without doing violence to the language used in section one—including the proviso—

its terms can not be held to include the transportation of goods

The question was raised [illegible] Legality of Express [illegible]

The free carriage [illegible] of property is contrary to the general principles to be found in the act to regulate commerce, as [illegible] sections 2, 3, and 6. The same principles are [illegible] more strongly in the legislation accompanying the [illegible] act and which was enacted in aid of its enforcement [illegible] the punishment of those who offend against [illegible] Any free carriage of passengers that is now lawful is contained in the form of exceptions to the general principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act. While the free carriage of certain of the excepted classes of passengers has thus been authorized even when traveling for pleasure or for their personal benefit, the spirit of the whole act forbids the free carriage of property except where public interests are involved under the conditions specified in section 22

This decision was reaffirmed in Legality of Express Franks, 69 I. C. C. 627, decided July 10, 1922. The findings as to express companies in these respects are applicable to other carriers.

Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act. Compare Int. Com. Com. v. Balt. & Ohio R. R., 225 U. S. 326; Arizona Rates, Fares and Charges, 61 I. C. C. 572; Pacific Engineering & Construction Co. v. C., R. I. & P. Ry. Co., 56 I. C. C. 247. Section 22 provides in part that:

* * * Nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat. * * *. Nothing in this Act shall prevent any carrier or carriers subject to this Act from giving reduced rates for the transportation of property to or from any section of the country with the object of providing

relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the commission (with or without a hearing); but in any such order the commission shall define such section and shall specify the period during which such reduced rates are to remain in effect.

The principal opposition to the proposed report came from the Association of Railway Executives. It is argued on behalf of this association that the free carriage of railway officials and employees authorized by the act includes a private car of another line occupied by one or more of them. In support thereof it is urged that such free carriage is universally recognized as not confined to the persons but includes their baggage, although baggage is property and the act does not specifically authorize its free transportation.

Baggage is usually transported without charge in addition to the passenger's fare, subject to certain restrictions as to weight and other matters. It is obvious that a person can not travel without certain property, such as clothing, and the transportation of this property is merely incidental to the transportation of the passenger. While the transportation of baggage may be spoken of as free, it is in reality covered by the passenger's fare. The property which may thus be transported without separate charge is defined in the tariffs, and when the weight permitted is exceeded separate charges are provided. Naturally, a person traveling on a pass is generally accorded the same baggage privileges as other passengers, and apparently he would have to pay the same charges as others on excess weight. There [fol. 32] are other limitations on the property which may be transported as baggage without separate charge; for example, such charges are often provided on bicycles and baby carriages. Recently certain carriers have provided for the checking of automobiles in baggage service at stated charges, which would apparently have to be paid whether the passenger is traveling on a pass or ticket. Such charges for the checking of certain articles are no doubt made because most passengers do not travel with these articles, and they are not considered ordinary or necessary baggage. In other words, their transportation is not such

an ordinary and necessary incident to the transportation of the passenger as to require or warrant their transportation without additional charge. While the transportation of a private car may be in a sense incidental to the transportation of the persons riding therein, the use of such cars is certainly not so general that they may be considered an ordinary or necessary incident to the transportation of the passengers, as in the case of baggage. It seems clear from the foregoing that the free transportation of a private car can not be justified upon the same principle as the transportation of baggage.

As a matter of fact, the baggage tariffs specifically prohibit the checking of numerous articles which are commonly included in private cars, such as chinaware, foodstuffs, and furniture. Not only that but such articles beyond question would be subject to charges if shipped by freight or express. It is strange indeed if a railroad official is entitled to have articles transported free in a private car which could not be checked and would be subject to charges if shipped in any other manner. Surely if a person riding on a pass must pay to check a bicycle or automobile, the principle of free baggage can hardly be invoked in favor of a private car. A person riding on a pass is not entitled to have anything transported free which is not covered by the fare paid by any other passenger.

In our view it is too far-fetched to say that because a person lawfully entitled to use a pass may have transported free a limited amount of baggage he may also bring and have transported free a private car embracing a kitchen, dining room, stateroom, sitting room, and necessary equipment, supplies, and attendants. According to the views advanced on behalf of the railway executives the family, relatives, and friends of the official or employee in charge of the private car being transported free may without objection likewise be accommodated therein. And when the car is no longer needed it may, under their interpretation, be sent over foreign lines to its home station without charge, or if the car is at its home station and is desired elsewhere on foreign lines for use it may be brought without expense. Free transportation is contrary to the general policy of the act and the definiteness and clarity with which Congress has [fol. 33] specified the extent to which free transportation

may be afforded by carriers subject to the act precludes the construction which counsel would have us place upon the pass provisions thereof.

The argument of the Association of Railway Executives that the carriers may lawfully haul the private cars of other lines without charge is also predicated on the theory that such a car is an instrumentality of commerce rather than an article of commerce. We are thus brought to a consideration of the question of when railway equipment generally may be transported without charge. Of course, a carrier may transport its own property without the payment of tariff charges. It would serve no useful purpose to require a carrier to transfer money from one pocket to another in payment of charges. Likewise, property which a carrier has hired or rented for the performance of its common carrier duties may be transported the same as property which it owns. It is well known that freight cars and to some extent passenger cars move freely over foreign lines, and it may be helpful to consider the terms on which such cars are handled.

Freight cars in service are generally interchanged between the principal carriers throughout the country under rules of the American Railway Association. The carrier in possession of the car pays the owning line a certain amount for each day the car is on its line. This is referred to as per diem and is in the nature of rent for the use of the car. It is paid whether the car is loaded or empty, as the empty movement is considered incidental to the loaded movement, and the carrier in possession may permit an empty car to be loaded with revenue freight. This use of the freight cars of another carrier relieves the carrier in possession of the burden of furnishing its own equipment, which is a distinct benefit, and it participates in the revenue from the freight. Freight cars in regular service are not subject to transportation charges but such cars are subject to charges when the transportation is not in regular service. The consolidated classification provides certain charges per car per mile for the transportation of all kinds of railway equipment on their own wheels. For example, dining, parlor, and sleeping cars are charged from 23 to 30 cents per mile in the various territories. These charges apply on new cars moving from the place of manufacture

to the home line before being placed in service, also on cars moving empty to and from repair shops off the home line, and on any other movements over foreign lines not in regular service. Apparently a car is in service when it is under load or has carried a load and is returning or seeking another load. In other words, so long as a car is being handled for revenue purposes, it is in service, and not subject to charges; but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line.

[fol. 34] Privately owned freight cars are also used by the carriers in transporting property of the owners. An allowance of so much per mile is paid by the carrier to the owner for the use of the car. This is based on the empty as well as the loaded movement, but if the empty movement exceeds the loaded movement the mileage allowance on the excess must be refunded, and in addition charges are assessed for the transportation of the car. Otherwise, no charge is made for the handling of a privately owned car in service, as its use benefits the carrier and is for revenue purposes. The charges in the consolidated classification for the transportation of cars not in service apply to privately owned as well as carrier equipment, no distinction being made because of private or carrier ownership.

Passenger cars of one carrier are sometimes operated over the lines of other carriers in maintaining through service. The terms on which this is done are a matter of contract, but in the absence of other arrangement the owning line is paid certain amounts per mile or per diem under rules of the American Railway Association. As in the case of freight cars, no charges are assessed for the handling of cars in service, but cars not in service are subject to the charges in the consolidated classification. The criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line.

Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum

It will be seen from the foregoing that tariff charges are provided for the transportation in freight trains of both carrier and privately owned cars of all kinds, when they are handled solely for the benefit of the owner and not for revenue purposes. It would not be seriously urged that such transportation could be rendered free if any attendant or other person having a pass should ride in the car. The tariffs also provide minimum charges for the transportation in passenger trains of special, privately owned, or chartered cars for the exclusive use of special parties.

Apparently these minimum charges would not be lessened or affected in any way if a person or persons having passes should ride in the car. All of these charges show that there is nothing in the nature of railway equipment which justifies its transportation without charge, except when it is being handled for revenue purposes in the interest of the carrier performing the service. Even then the revenue from a passenger car used exclusively by a special party must be sufficient to warrant its transportation.

The propriety of tariff charges for the movement of railway equipment on its own wheels has been recognized by us in numerous cases. In two of them in fact we found that the charges assessed on freight cars were applicable even though they were transported under load. Pacific Engineering & Construction Co. v. C., R. I. & P. Ry. Co., supra; McCloud River Ry. Co. v. S. P. Co., 56 I. C. C. 287. Although charges are not generally assessed on cars under load, the charges assailed in the cases cited were upheld on the ground that the carriers had never agreed to accept the cars in interchange service. It was recognized that loaded cars are presumed to have been accepted in interchange service, but this presumption was found to have been overcome under the circumstances of these cases. Stated in another way, the charges were found applicable because the carriers had not hired the cars and they did not pay the usual mileage allowance for their use. In a more recent case we found that the charges assessed on certain cars hauled under load were not applicable because the cars had been accepted in interchange service and the mileage allowance was paid for their use. Haffner Thrall Car Co. v. N. P. Ry. Co., 146 I. C. C. 47. The thory underlying these decisions is that a carrier may not assess charges on [fol. 36] a car which it has hired the use of, but it may and should assess charges when it has not hired the use of the car even though it is hauled under load.

The transportation of a private car of another carrier is ordinarily for the benefit of the owning line or its officials and not for revenue purposes. While ticket passengers may sometimes occupy such a car, they do so by invitation, and the carrier performing the transportation is not at liberty to make use of the car by putting other passengers in it. The returns to our questionnaire indicate that it

is seldom, if ever, that the number of ticket passengers is sufficient to make the hauling of the private car of another carrier profitable to the carrier performing the service. This is further indicated by the additional fact that such passengers apparently do not pay the surcharge, which is assessed on persons riding in Pullman and privately owned or chartered cars. Indeed, the few ticket passengers sometimes riding in the private car of another carrier could probably be accommodated in other equipment that must be hauled anyhow, and the transporting carrier would receive more revenue if they rode in an ordinary Pullman car. Under these circumstances a carrier hauling the private car of another line can not be said to have hired its use, as it would have no interest in doing so and pays no rental therefor. Even if car hire should be provided on private cars, it would obviously be a mere subterfuge which could not change the legality of the practice. Our conclusion is that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its performance without charge, on the same principle as the free handling of revenue producing equipment.

The Association of Railway Executives asserts that the carriers have always hauled the private cars of other lines without charge, that this practice has been well known to the commission, and that we have expressly approved it. It is contended, therefore, that we have interpreted the act as permitting the practice, and cases are cited to the effect that such an administrative interpretation is entitled to considerable weight where it is long continued and uniform.

In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of the home line. [fol. 37] The form of pass does not specifically indicate whether it is for home or foreign-line cars or both. It

might in fact be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars.

It is also argued that where our pass regulations refer to passes for sleeping, parlor, *and other accommodations*, the words in italic include a private car of another line. We think those words were meant to cover such similar accommodations as a stateroom or berth on a steamer. A private car of another line can not be regarded as an accommodation furnished by the carrier issuing the pass. We do not see how the words in question can be given the construction sought.

Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge, and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. The Tap Line Case, 23 I. C. C. 277, 298; Colorado Free Pass Investigation, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was The Five Per Cent Case, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials.

It may be assumed that the practice of hauling the private cars of other lines without charge prevailed at the time of the passage of the act to regulate commerce. That, however, does not indicate an intention on the part of Congress

to permit the practice, since, as stated in our third annual report, the law aimed at the correction of the abuses of free transportation. Nor can the long existence of the practice of issuing passes for foreign-line private cars be regarded as legalizing it. As previously stated, in American Express Co. v. United States, supra, the Supreme Court held [fol. 38] that an express company could not lawfully issue franks to certain classes of persons for the transportation of property, notwithstanding the contention that the custom of issuing such franks was one of long standing and no protest against the practice had been made to or by the commission. This is the the first time that the lawfulness of the practice of issuing passes for foreign-line private cars has been brought in issue before us. Of course, good faith might be urged in defense of past violations, but obviously it could not be so urged in respect of a violation after the law has been construed by this commission.

It is urged that while the practice of transporting foreign-line private cars without charge is lawful our investigation has shown that the courtesy extended as between roads has in some instances been abused. It is proposed to correct such abuses by the adoption of a code of ethics limiting such courtesies and calling for reports to be rendered covering the movement of private cars on foreign lines. Counsel stresses the point that although the practice of transporting private cars without charge is of long standing we have not declared it unlawful. As previously stated, this is the first time the legality of the practice has been before us for decision. Apparently it is the first time the practice has been given serious consideration by the Association of Railway Executives since only after our investigation were the abuses of what they term a lawful courtesy discovered. There is no more reason for construing our failure to declare the practice unlawful as approving the practice, than there is for construing the failure of the executives to correct the long-existing abuses as approving them. After observing our finding that the transportation of private cars over foreign lines should be paid for through the assessment of a just and reasonable charge the executives will still have a duty to perform in eliminating unnecessary use of private cars and in thereby promoting efficient and economical management as contemplated by the act.

The Chicago & Eastern Illinois was the only carrier which filed exceptions to the proposed report. It urges that the assessment of charges for the movement of private cars over foreign lines would handicap it in the solicitation of traffic in the Southeast and Southwest. This line is a part of through routes to and from points in those territories which it can reach only over the rails of its connections, while certain competitors such as the Illinois Central and the Santa Fe extend all the way to many of the important southeastern or southwestern points. Apparently the Chicago & Eastern Illinois has been sending its private cars over the lines of its competitors as well as other carriers for the purpose of soliciting traffic in their territory. It is not clear why the use of private cars is so important in the solicitation of traffic, which is ordinarily [fol. 39] handled by traffic representatives, such as this line has at various points in the Southeast and Southwest. During the three years covered by our questionnaire, the private cars of the Chicago & Eastern Illinois traveled 28,274 miles on foreign lines, while it hauled the private cars of other carriers 44,223 miles. The assessment of reasonable charges for such movements would, therefore, have been to the advantage of this carrier.

Reciprocity between carriers is no justification for the free transportation of private cars. It will be observed that railway equipment generally which is not in revenue service is not handled on that principle, and it could not be so handled lawfully. Moreover, the returns to our questionnaire show that there is seldom a fair balance between the service performed by different carriers in transporting the private cars of each other. On the contrary, the returns show that there is often a wide difference in the relative amount of service performed in hauling such cars. No one has contended that the theory of reciprocity warrants the free handling of private cars. Transportation must be paid for in cash and not in commodities or services. In re Contracts for Free Transportation, 16 I. C. C. 246; United States v. C. I. & L. Ry. Co., 163 Fed. 114; Louisville & Nashville R. R. Co., v. Mottley, 219 U. S. 270.

As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This

is apparent from the fact that the charges are the same whether the car is occupied by 1 passenger or 25. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenue are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them. In so far as these charges do not apply to the private cars of other carriers, they are unjustly discriminatory and unduly preferential and prejudicial. See In the Matter of Restricted Rates, 20 I. C. C. 426, wherein it was found in violation of sections 2 and 3 to charge less for the transportation of railway coal than the rates charged on commercial coal. This decision was upheld by the Supreme Court in Int. Com. Com. v. Bali. & Ohio R. R., supra.

We find that the transportation or movement of private passenger cars, including so-called office cars, by one carrier for another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act. The assessment of a just and reasonable charge by carriers transporting private cars for others, and for services rendered in connection therewith, is not only required by the act but will be [fol. 40] in keeping with efficient and economical management.

This finding does not extend to the point of saying that it is unlawful for private cars of one carrier to be transported over the lines of other carriers, but is confined to the assertion that under existing law the transportation of private cars on foreign lines should be paid for through the assessment of a just and reasonable charge.

As shown in Appendix A, a substantial percentage of the occupants of private cars hauled free, or at less than tariff rates, were business associates, relatives, or friends holding tickets which entitled them only to transportation in the ordinary coach. A total of 22,391 passenger-miles were traveled by such persons in private cars of the Nickel Plate and a total of 208,203 passenger-miles were traveled by such persons in private cars of the Chicago, Rock Island & Pacific during the three-year period. The returns of other carriers show similar travel.

Carriers according passengers the comforts and facilities of private cars, including berth and other accommodations, are treating unequally and unfairly the passengers accorded the ordinary coach facilities but who are charged at the same rate as those traveling in private cars, and they also discriminate against those who pay the surcharge for riding in ordinary sleeping or parlor cars and privately owned or chartered cars.

It is provided in section 2 of the act:

That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

It is also provided in paragraph 1 of section 3 of the act:

That is shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Association of Railway Executives urges that the question of whether it is unjustly discriminatory and unduly prejudicial to furnish private-car accommodations to [fol. 41] invited guests without charge depends upon the circumstances of each individual case. They seem to think that circumstances may warrant the furnishing of a berth and other accommodations in a private car without charge, provided only that the passenger has purchased a ticket entitling him to passage. We are unable to see how a berth

or other accommodations for which a tariff charge is usually made can be furnished free any more than a passenger can be carried without charge. A carrier which furnishes free a berth or other accommodations in a private car similar to those for which tariff charges would be assessed if the passenger rode in a Pullman car is clearly guilty of violating section 6 of the act.

It is suggested that the furnishing of a berth or other accomodations in a private car is merely a courtesy extended by one passenger to another. The furnishing of a berth or other accommodations in a Pullman or private car without charge to a person not lawfully entitled to free transportation is just as clear a violation of the spirit and plain intent of the act as carriage without the purchase of a coach ticket.

The railway executives further urge that a hearing must be held in each individual case to determine whether the circumstances and conditions are so similar as to warrant an order requiring the removal of the discrimination and prejudice. This argument sounds like that made by the carriers soon after the passage of the act to regulate commerce. It was contended then that a difference in circumstances and conditions warranted the issuance of passes to certain classes of persons, such as public officials. That contention was rejected in In Re Persons Free or at Reduced Rates by B. & M. R. R. Co., 5 I. C. C. 69, 78; and William H. Harvey v. Louisville & Nashville R. R. Co., 5 I. C. C. 15.

One of the fundamental purposes of the act is "to compel the carrier as a public agent to give equal terms to all" and "to cut up by the roots every form of discrimination, favoritism, and inequality." New Haven R. R. v. I. C. C., 200 U. S. 361; L. & N. v. Mottley, 219 U. S. 467; U. S. v. Union Stock Yard, 226 U. S. 286.

We further find that the transportation of persons in private passenger cars, including berth and other accommodations for which a charge is made in Pullman cars, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory, unduly preferential of the former, and unduly prejudicial to the latter as well as those who pay the surcharge for riding in ordi-

nary sleeping or parlor cars and privately owned or chartered cars.

The carriers will be expected to cease and desist from the violations of the act herein found, but in view of the penalties provided for such violations, no order appears to be necessary.

[fol. 42] BRAINERD, Commissioner, dissenting in part:

The majority's decision is based upon information obtained by the commission from returns made to a questionnaire sent to Class I and II carriers. No hearing has been held and no opportunity for the introduction of evidence or the examination or cross-examination of witnesses has been granted. This report is adopted over the carriers' exceptions based in part upon a failure to accord them a full hearing. While I concur in much if not all that is said by the majority, I do not wish to be understood as approving the practice of adopting formal reports containing findings of fact or conclusions of law based upon an investigation, whether upon our own motion or otherwise, without having first held a hearing at which all parties have been afforded an opportunity to introduce evidence and examine and cross-examine witnesses in such manner as may be necessary to conform to the requirements of due process of law. The more liberal the practice, the more imperative the obligation to preserve the essential rules by which rights are determined.

I am authorized to state that Commissioners Woodlock and Porter concur in the views herein expressed.

Appendices, with the foregoing report, A to H, both inclusive, are omitted from this print but will be furnished the court and counsel in the form of the government print.

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[fol. 43] EXHIBIT "C" TO PETITION

Interstate Commerce Commission, Washington, D. C.

December 26, 1928.

Notice to the Public

Since May 7, 1908, it has been the practice of the Interstate Commerce Commission from time to time to compile

and issue for public information its conference rulings upon questions raised or submitted in correspondence. Reissues have been made, which, besides embodying new conference rulings, have revised or rescinded previous rulings which had become obsolete. The last issue of conference rulings bears date August 1, 1917.

The Commission has considered the revision and possible enlargement of its conference rulings. Many of the rulings have been made obsolete, as the subject matter has since been dealt with in formal reports and orders of the Commission, or in various formal circulars. Others are incorrect, and should be modified or rescinded, because counter to subsequent acts of Congress. The conference rulings cover only a portion of the activities of the Commission. To correct and bring the outstanding rulings to date, without the formulation and inclusion of many like informal correspondence rulings upon other phases of the Commission's jurisdiction, would give undue emphasis to parts of its activities.

In the opinion of the Commission, although the rulings have served a very useful purpose in the past, it is not now practicable or desirable to revise and amplify them, or to continue their publication. Accordingly the Commission has ordered that the conference rulings be rescinded in their entirety and their use as authority be discontinued. This action has been taken without reference to the correctness of individual rulings.

By the commission, G. B. McGinty, Secretary.

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[fol. 44] EXHIBIT "D" TO PETITION

Interstate Commerce Commission, Washington

In the Matter of Regulations to Govern the Forms and Recording of Passes, Issue of 1917

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 30th day of July, A. D., 1929:

The matter of issuing passes for private passenger-train cars being under consideration:

It is ordered that the Regulations to Govern the Forms and Recording of Passes, Issue of 1917, prescribed under an

order of the Commission, entered on July 8, 1916, be and the same are, hereby amended by adding between lines 11 and 12 in paragraph 15 the following:

A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See In the Matter of Private Passenger Train Cars, 155 I. C. C. 775.

It is further ordered that this order shall become effective on August 1, 1929.

By the commission, Division 4, George B. McGinty, Secretary.

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[fol. 45] IN UNITED STATES DISTRICT COURT

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed December 17, 1929

The Interstate Commerce Commission *Commission*, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiences contained in the petition, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the opening paragraph and subdivisions numbered 1 to 4, inclusive, of the petition, the Interstate Commerce Commission, hereinafter called the Commission, admits the truth of the allegations therein contained, except that the Commission disclaims information sufficient to form a belief as to the truth of the allegation contained in the opening paragraph to the effect that petitioners sue on behalf of all other carriers subject to the Interstate Commerce Act, which may have an interest in the premises, and the Commission demands strict proof thereof. Further and

more particularly answering subdivisions numbered 3 and 4 of the petition, the Commission admits and alleges that it made and entered the report of March 14, 1929, and the order of November 4, 1929, therein referred to, and admits that two documents marked Exhibits B and A which are filed with and as parts of the petition are true and correct copies, respectively, of the Commission's said report and of its said order.

II

Answering subdivision numbered 5 of the petition, the Commission admits that the allegations therein contained, relating to the provisions contained in its said order of November 4, 1929, are substantially correct. In this con- [fol. 46] nection, however, the Commission respectfully refers the court to the copy of its said order which, as heretofore said, is filed with and as part of the petition marked Exhibit A.

III

Answering the first paragraph of subdivision numbered 6 of the petition, the Commission admits that the allegations, therein contained, relating to the provisions of paragraph (7), Section 1, and of Section 22 of the Interstate Commerce Act, are substantially correct. In this connection, however, the Commission respectfully refers the court to said provisions of said Act for full and complete information in the premises.

Answering the allegations in the second paragraph of subdivision numbered 6 of the petition, which is to the effect that the now outstanding free tickets and free passes issued by each of the petitioners were given in exchange for similar interstate free passes issued by other carriers to its officers or employees, the Commission denies the truth of said allegation in so far as it is an allegation that the free tickets and free passes issued by each of the petitioners to the officers and employees of any particular carrier were given in exchange for free tickets and free passes issued to its officers or employees calling for similar, or an equivalent amount of, free transportation.

IV

Answering subdivision numbered 7 of the petition, the Commission admits that it is the right of a carrier issuing a

free pass, ticket or other evidence of free transportation to transport free over its line persons lawfully holding such free passes, free tickets or other evidence of free transportation. Except as so expressly admitted, the Commission denies the truth of each of and all the allegations contained in said subdivision numbered 7.

V

Answering subdivision numbered 8 of the petition the [fol. 47] Commission denies the truth of each of and all the allegations therein contained.

VI

Answering subdivision numbered 9 of the petition the Commission denies that at the time of the original enactment by Congress of the Interstate Commerce Act and at the time of each of the amendments made thereto, the practice of moving persons entitled to use, and using, free transportation in the private or public car of another carrier free and without imposing any charge for the movement of the car, was generally known to exist; denies that neither in the original Act to Regulate Commerce nor in any subsequent amendment is there contained any prohibition against said practice, and denies that Congress has either sanctioned or adopted an interpretation of said laws which would recognize such practice as lawful.

VII

Answering subdivision numbered 10 of the petition, the Commission alleges that the allegation, therein contained, that the practice of moving persons entitled to use, and using free transportation in the private or business car of another carrier free and without imposing any charge for the movement of the car, has always been well known to the Commission, is based upon speculation and that therefore, and because said allegation is incompetent irrelevant, and immaterial, the Commission neither admits nor denies that said allegation is true; and the Commission denies that it has ever either impliedly or expressly recognized such practice as lawful.

Further answering said subdivision numbered 10, the Commission admits that the portions of paragraphs (6) of

Section 1 and of paragraph (1) of Section 6 of the Interstate Commerce Act, therein set forth, are correct copies in part of the provisions of said paragraphs; admits and alleges that at the time of its decision herein involved, [fol. 48] tariffs filed with it failed in most cases to cover definitely and clearly the transportation by carriers, subject to the Interstate Commerce Act, of the private or business cars of other carriers subject to the Act in passenger service; denies petitioners' allegation that no tariff covering such transportation "has ever been filed with the Commission, as the Commission has well known", and alleges that petitioners' allegation that "no requirement was ever made by the Commission, up to the time of its order in this proceeding, that any such tariff should be filed" is incompetent, irrelevant and immaterial, and, therefore, neither admits nor denies that said last-mentioned allegation is true.

Further answering said subdivision 10 of the petition, the Commission admits that its Conference Rulings, up to the time that they were rescinded, as hereinafter mentioned, prescribed the form of pass set forth in said subdivision; denies that said subdivision contains an accurate and complete statement in respect of the form of pass prescribed by its pass regulations and, for accurate and complete information in the premises, respectfully refers the court to its Regulations to Govern the Form and Recording of Passes, Issue of 1917, a copy whereof is annexed to and made a part of this answer, marked Exhibit A; denies that its Conference Rulings and Regulations to Govern the Form and Recording of Passes, either by prescribing a form of pass or in any other way, recognized the lawfulness of the practice of moving persons entitled to use, and using, free transportation in the private or business car of another carrier free and without imposing any charge for the movement of the car; denies that Congress, in reenacting paragraph (7) of section 1 and section 22 of the Interstate Commerce Act, either ratified or adopted an interpretation of those provisions of law which would permit of, and recognize as lawful, said practice; admits that said Conference Rulings were rescinded by its order of December 26, 1928, a true copy whereof is filed with and as a part of the petition marked Exhibit C; admits that said Regulations to

[fol. 49] Govern the Form and Recording of Passes were amended by its order of July 30, 1929, a true copy whereof is filed with and as a part of the petition marked Exhibit D.

Further answering said subdivision 10, and particularly the last paragraph thereof, the Commission denies that its said last mentioned order of July 30, 1929, is an order within the meaning of paragraph (8) of section 16 of the Interstate Commerce Act. The Commission alleges that the provisions of said paragraph (8) of section 16 are applicable only to orders made under sections 3, 13 or 15 of said act; that its said order of July 30, 1929, was not made under any of those sections but was made under section 20 of said act in that it was an amendment to its Regulations to Govern the Form and Recording of Passes which had been prescribed in accordance with said section 20.

VIII

Answering subdivision 11 of the petition, the Commission admits the truth of the allegations therein contained.

IX

Answering subdivision 12 of the petition, the Commission denies the truth of each of and all the allegations therein contained.

Except as herein expressly admitted the Commission denies each of and all the pertinent and material allegations contained in the petition in so far as they conflict either with the allegations or denials of the Commission herein contained or with the statements of fact contained in the Commission's said report of June 21, 1929.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel.

[fol. 50] *Duly sworn to by Frank McManamy. Jurat omitted in printing.*

# REGULATIONS

TO GOVERN THE

# FORMS AND RECORDING OF PASSES

PRESCRIBED BY THE

INTERSTATE COMMERCE COMMISSION

IN ACCORDANCE WITH SECTION 20 OF THE
ACT TO REGULATE COMMERCE

---

ISSUE OF 1917

*Effective on January 1, 1917*

(Superseding and canceling Regulations to Govern the Issuing and Recording of Passes of Steam Roads)

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

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## THE INTERSTATE COMMERCE COMMISSION.

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## ORDER.

### At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of July, A. D. 1916.

The subject of a uniform system for the issuing and recording of passes to be prescribed for carriers being under consideration, the following order was entered:

*It is ordered*, That the following Regulations to Govern the Forms and Recording of Passes, Issue of 1917, be, and the same are hereby, approved; that a copy thereof duly authenticated by the Secretary of the Commission be filed in its archives, and a second copy thereof, in like manner authenticated, in the office of the Division of Carriers' Accounts; and that each of the said copies so authenticated and filed shall be deemed an original record thereof.

*It is further ordered*, That the said Regulations be, and are hereby, prescribed for the use of carriers by rail (including electric railways), carriers by water, and sleeping car companies, subject to the provisions of the amended act to regulate commerce in the issuing and recording of passes; that each and every such carrier and each and every receiver or operating trustee of any such carrier be required to issue all passes and keep all pass records in conformity therewith; and that a copy of the said Regulations be sent to each and every such carrier and to each and every receiver or operating trustee of any such carrier.

*It is further ordered*, That the said Regulations are, and by virtue of this order do become, the lawful rules according to which all passes are to be issued and all pass records are to be kept; that each and every person directly in charge of the free transportation of any such carrier or of any receiver or operating trustee of any such carrier is hereby required to see to, and under the law is responsible for, the correct application of the said regulations in the issuing and recording of passes; and that it shall be unlawful for any such carrier or for any receiver or operating trustee of any such carrier, or for any person directly in charge of the free transportation of any such carrier or of any receiver or operating trustee of any such carrier, to issue any passes or to keep any pass records except in the manner and form in the said Regulations set forth and hereby prescribed, and except as hereinafter authorized.

*It is further ordered*, That any such carrier or any receiver or operating trustee of any such carrier may adopt additional record forms: *Provided, however*, That a list of such additional record forms, showing their use and their purpose, be first filed in the office of the Division of Carriers' Accounts, subject to disapproval by the Commission.

*It is further ordered*, That the said Regulations to Govern the Forms and Recording of Passes, Issue of 1917, shall become effective on January 1, 1917, and that this order shall supersede and cancel the orders of June 8, 1911, March 11, 1912, May 6, 1912, and June 28, 1915, in the matter of regulations to govern the issuing and recording of passes of steam roads.

By the Commission.

[SEAL.] GEORGE B. MCGINTY,
*Secretary.*

## REGULATIONS TO GOVERN THE FORMS AND RECORDING OF PASSES.

These regulations apply to all carriers of classes designated in the order whether passes are issued or are honored for transportation wholly within one state or otherwise, and whether the operated mileage or termini of any such carrier be located entirely within the limits of one state or otherwise.

**Nonrevenue passenger service.**

1. All nonrevenue passenger service, whether transportation, meals, or sleeping, parlor, or other accommodations, except as provided in paragraphs 39 and 42 to 51, inclusive, furnished by steam roads, electric railways, carriers by water, and sleeping car companies, subject to these regulations, shall be covered by passes as hereinafter prescribed.

**General classes of passes.**

2. Passes issued shall consist of not more than eight general classes, viz:

1. Annual or term passes for passage only.
2. Annual or term passes for meals and sleeping, parlor, and other accommodations, but not including passage.
3. Annual or term passes for passage, including meals and sleeping, parlor, and other accommodations.
4. Trip passes for passage only.
5. Trip passes for meals and sleeping, parlor, and other accommodations, but not including passage.
6. Trip passes for passage, including meals and sleeping, parlor, and other accommodations.
7. Commuter passes.
8. Telegraph passes.

(*a*) *Annual* passes are those good until the end of the calendar year without restriction as to the number of trips.

*Term* passes are those good for a specified period of time less than a year and without restriction as to the number of trips.

*Trip* passes are those good for a specified period of time and restricted to a single trip or to one round trip.

*Commuter* passes are those good for a specified period of time and restricted as to the number of trips. This form of pass need not be confined to suburban territory, but may be issued over any portion of a carrier's line.

*Telegraph* passes are those issued upon telegraphic or telephonic authority and restricted to a trip in one direction within a specified period of time.

(*b*) Carriers are at liberty to enlarge this classification of pass forms, provided it is done by subdividing any of the general classes, and provided further, that the record of pass stock received and distributed shows the distinctive features of pass forms so subdivided. (See par. 12.) It is not desired that carriers file with the Commission samples of their passes.

(*c*) If the number of passes to be issued for meals and sleeping, parlor, and other accommodations, including passage, is relatively small, carriers are permitted to indorse a pass of any class prepared for passage only so as to include such accommodations as are to be furnished. (See par. 54.)

**Officers issuing and requesting passes.**

3. Each carrier shall file with the Commission, on or before January 1 of each year: (*a*) A list of the names and titles of officers in whom is reposed the authority for the issuance of passes and over whose signatures passes will be issued, and (*b*) a list of the names and titles of officers having the authority to request passes of other carriers. (See par. 5.) Any changes in these lists in the course of the year must be reported promptly.

4. The names and titles of persons authorized to countersign passes and requests for passes need not be filed with the Commission.

5. Requests for passes for or on account of officers or employees of traffic associations, fast freight lines, demurrage and car-service bureaus, weighing and inspection bureaus, and other joint agencies maintained by or on behalf of carriers subject to these regulations, for transportation over the lines which are members of such associations may be made direct on such lines in the same manner as provided for requests for passes for or on account of a carrier's own officers or employees. (See par. 27.) Requests for passes over lines other than member lines must be made in one of the three following methods:

(*a*) Requests may be made over the signature of an officer of a member line if such officer's name has been filed with the Commission by such member line in compliance with paragraph 3 (*b*), with the counter signature of an officer or employee of the association.

(*b*) Requests may be made over the signature of an officer of the association if such officer's name has been filed with the Commission by one or more of the member lines in accordance with paragraph 3 (*b*) as having authority to request passes on account of the association

(*c*) Requests may be made over the signatures of officers of the association if such officers' names have been filed with the Commission in accordance with paragraph 3 (*b*) by the chief officer of the

association, provided such chief officer has been delegated authority to so act by the member lines.

**Signatures of issuing officers.**

6. Each pass (except a telegraph pass) must bear either the autograph or the facsimile signature of one of the officers named in the list referred to in clause (*a*) in paragraph 3.

7. Each pass bearing facsimile signature must be countersigned with ink, except as provided in paragraph 13, by an officer or responsible subordinate, who must be designated on the pass.

**Pass stock.**

8. The ordering of all pass stock must be confined to requisitions made by a single designated officer and delivery of the entire stock must be made to him. All vouchers or bills covering the cost of pass stock shall be approved by the officer making requisition therefor before they are carried through the accounts for payment. Unissued pass stock must be filed in such manner as to be accessible and convenient for examination.

**Numbering passes.**

9. All passes (except telegraph passes issued on telegraph blanks) shall be consecutively numbered before or immediately upon receipt from the printer or stationer. No two passes of the same general class shall bear the same number without an indicative letter prefixed or affixed. Unless all passes are numbered in one series, each general class adopted shall constitute a series of numbers and each subdivision of any general class adopted shall constitute a series of numbers with an indicative letter prefixed or affixed.

10. If a separate stock of passes is provided for each year the numbering must begin with 0 or 1 at the beginning of the year. If the same stock is used for two or more years the numbers may continue consecutively from year to year, commencing with 0 or 1 when desired, but not oftener than once in each calendar year.

11. If adherence to these rules would result in passes carrying numbers consisting of more than five figures, a new series of numbers beginning with 0 or 1 with a letter prefixed may be adopted, provided the letter so prefixed does not occur on any other class of passes.

**Record of pass stock received and distributed.**

12. A record of pass stock received and distributed must be kept by the officer ordering the pass stock. (See Form 9.) Each of the different forms and series of passes received must be entered on separate sheets or pages and must be recorded and distributed in numerical order. This record must show the form of pass, also the distinctive features of any pass prepared as a subdivision of any of the general classes as provided in paragraph 2(*b*). On the debit side of the record must be entered the entire pass stock received. On the

credit side must be entered all pass stock distributed among other officers or countersigning subordinates, all stock assigned to the officer ordering the stock and issuable by him, and all pass stock destroyed. (For the periods of retention see regulations to govern the destruction of records.)

**Preparation of passes.**

13. All passes must be filled out with a durable ink, either with pen or typewriter, or by printing, except that in case of emergency a trip pass may be filled out and countersigned by the use of indelible pencil.

14. Each pass issued must bear upon its face the name of the person to be accorded free transportation, who must be of a class named in section 1 of the act to regulate commerce as eligible to receive free transportation.

15. A pass may include, in addition to the person named thereon, a specified number of unnamed persons of any class eligible to receive free transportation, the number and the class to which such persons belong being specified upon the pass; e. g.,

*Pass* John Smith, car, and five officers and employees.
*Account* President, officers, and employees X. Y. & Z. Ry.
*Pass* John Smith and six employees.
*Account* Section foreman and laborers X. Y. & Z. Ry.
*Pass* One extra messenger when presented with letter signed by superintendent of Eastern Express Co. authorizing use and giving name of person to be passed.
*Account* Messenger, Eastern Express Co.

A pass for "John Smith and three children" is not a sufficient compliance with the provisions of this paragraph; it must be made so that the representation that they are the children of the person named shall affirmatively appear; e. g.,

*Pass* John Smith, one son, and two daughters.
*Account* Brakeman, X. Y. & Z. Ry.

16. The name of the person presenting the pass must appear upon it unless it be prepared similar to the third example of paragraph 15, and presented with letter authorizing use and giving name of person to be passed. Passes issued for the transportation of more than one person so as to be used by such persons separately must name the person actually using the pass. For instance, a pass to be used by John Smith and his daughter, separately, or a pass to be used by William Brown and one brakeman, separately, should read:

*Pass* John Smith and Miss Mary Smith.
*Pass* John Smith and daughter Mary.
*Pass* William Brown and Edgar Moore.

A pass issued to "John Smith and wife" or to "Mr. and Mrs. John Smith" is construed as if having the name of the wife appearing upon it and may be used by her in the absence of her husband.

17. Each pass must show, in accordance with the following, on what account it is issued:

(*a*) A pass for an officer or employee of the carrier issuing the pass must show the title or occupation of the person to whom it is issued, e. g.,

*Pass* John Smith.
*Account* Brakeman.

(*b*) A pass for a member of the family of an officer or employee of the carrier issuing the pass must show the name of such officer or employee, except as provided in paragraph 17 (*c*), his title or occupation, and the relationship of the person to whom it is issued, e. g.,

*Pass* Miss Mary Smith.
*Account* Daughter of John Smith, brakeman.

(*c*) A pass for the wife of an officer or employee of the carrier issuing the pass, which shows the husband's Christian name, may omit, after "Account," the name of such officer or employee, e. g.,

*Pass* Mrs. John Smith.
*Account* Wife of brakeman.

(*d*) A pass for an officer or employee of a carrier other than the carrier issuing the pass must show the title or occupation of the person to whom the pass is issued and the name of the carrier by which employed, e. g.,

*Pass* John Smith.
*Account* Brakeman, A. & B. R. R.

(*e*) A pass for a member of the family of an officer or employee of a carrier other than the carrier issuing the pass must show the name of such officer or employee, except as provided in paragraph 17 (*f*), his title or occupation, the relationship of the person to whom the pass is issued, and the name of the carrier by which employed, e. g.,

*Pass* Miss Mary Smith.
*Account* Daughter of John Smith, brakeman, A. & B. R. R.

(*f*) A pass for the wife of an officer or employee of a carrier other than the carrier issuing the pass, which shows the husband's Christian name, may omit, after "Account," the name of such officer or employee, e. g.,

*Pass* Mrs. George Brown.
*Account* Wife of clerk, A. & B. R. R.

(*g*) Every pass issued to a person other than an officer or employee of a common carrier or members of their families must state in the space provided for "Account" the reason for the issuance of the pass, e. g.,

*Pass* Mrs. Sarah Jones.
*Account* Charity.
*Pass* Mr. Henry Brown.
*Account* Traveling secretary, R. R. Y. M. C. A.

18. Every pass issued upon which meals, or sleeping, parlor, or other accommodations are to be furnished free must indicate the character of the accommodations to be furnished thereon, e. g.,

(*a*) When pass does not include passage (see Forms 2 and 5):

To occupy one stateroom.
To meals and berth.

(*b*) When pass includes passage and accommodations (see Forms 3 and 6):

Including parlor room.
Including meals and berth.

19. The territory in which or the points between which a pass will be honored must be shown upon it, e. g.,

From ——— to ———.
Between ——— and ———.
Over entire system.

20. The period of time for which a pass will be accepted for transportation must be indicated upon it, e. g.,

Until ———.
Good for one trip only until ———.
Expires ———.
If used within ——— days.

**Requests for passes.**

21. Passes shall be issued only upon written requests, or telegraphic requests confirmed by written requests, except as provided in paragraphs 23 and 24, and in accordance with the forms hereinafter prescribed as applicable.

22. All the information required to be shown on passes issued, as prescribed in paragraphs 14 to 20, inclusive, must be indicated on requests for passes. In addition to such information requests must furnish information in accordance with the following:

(*a*) The address of the person for whom the pass is requested.

(*b*) If request be made for a pass for or on account of an officer or employee of a carrier other than the carrier by which such pass may be issued, it must contain a statement that the person for whom the pass is requested is not prohibited by law from receiving free transportation. (Forms 16 and 17.)

(*c*) If request be made for a pass for a person other than an officer or employee, or the member of the family of an officer or employee, of a common carrier the request must give evidence, clearly set forth, or be accompanied by papers, showing the legality of the issuance of the pass requested. No form is prescribed for requests of this character.

23. Written requests for passes may be dispensed with in the following cases, provided the records of passes issued show the full

information required, and in addition state upon whose authority the passes were issued and the reasons for dispensing with written requests:

(*a*) For passes issued to employees engaged in the office in which the passes are actually prepared.

(*b*) For passes sent to employees attached to the office in which the passes are actually prepared but temporarily located at other points to travel upon instructions from such office.

(*c*) In cases of emergency requiring immediate use of pass and when there is insufficient time to procure written requests before issuance.

24. Carriers may, at their option, permit their principal officers to furnish passes to officers and employees, and to the members of families of officers and employees, of other carriers subject to these regulations, who are not prohibited by law from using free transportation, without requiring written requests, provided:

(*a*) That acknowledgments, in accordance with Form 22 hereinafter prescribed, be secured from the persons to whom or on whose account the passes are issued, or from an officer whose name has been filed with the Commission, in compliance with paragraph 3 (*b*), of the carrier on whose account the passes are issued; and provided further,

(*b*) That notices, in accordance with Form 23 hereinafter prescribed, be given the carriers on whose account the passes are issued through the officers of such carriers ordinarily authorized to issue requests on other carriers for passes (see par. 68); and provided further,

(*c*) That the records of the issuing carriers show upon whose authority the passes are issued.

Carriers should be prepared to furnish the Commission, when so required, a full report of passes issued without written requests under the provisions of this section.

25. Notices to other carriers advising of the issuance of passes without written requests must be made in duplicate, or legible impression copies must be taken of them, and the duplicates or impression copies must be retained by the issuing carrier.

26. Requests for passes, also acknowledgments received and copies of notices retained for passes issued without requests, must be filed in the office in which are filed records of annual or term passes or the stubs or carbon copies of trip passes, and in such manner as to be accessible and convenient for examination. The numbers of the passes issued must be noted upon the faces of the requests.

**Signatures on requests for passes.**

27. Requests for passes for or on account of a carrier's own officers or employees must be made over the signature of the person to whom or on whose account the passes may be issued or by a superior or ranking officer or employee. (See par. 5 regarding joint agencies, etc.)

28. Requests for passes for or on account of officers or employees of a carrier subject to these regulations, other than the carrier issuing the pass, must be over either the autograph or facsimile signature of one of the officers named in the list referred to in clause (*b*) paragraph 3. In case the facsimile signature is used the request must be countersigned with ink by an officer or responsible subordinate, who must be designated thereon. (See par. 5 regarding joint agencies, etc.)

29. Requests for passes for any persons not covered by paragraphs 27 or 28 must be made over the signatures of the persons making such requests.

**Signatures of users of passes.**

30. All passes must bear the signatures of the users, preferably in ink. On the back of each pass, other than a telegraph pass issued on a telegraph blank, must appear a statement that the holder is not prohibited by law from receiving free transportation, and that the pass will be lawfully used. This statement may be shown among other conditions, if any, and must be subscribed to by the holder.

31. A pass issued for a number of persons, but naming only one person, such as—

> John Smith, section foreman, and six employees of X. Y. & Z. Ry.
> George Jones and two daughters,

need be signed only by the person whose name appears on the pass.

32. A pass issued for a number of persons, the names of all appearing on the pass, such as—

> William Brown and Edgar Moore, brakemen,

must be signed by the users, whether the pass is used by one or by more than one of the persons named thereon; except that such pass when issued to the members of a family need be signed only by one of the persons using it.

33. A pass issued for a person without giving the name, such as—

> Pass one extra messenger when presented with letter, etc.,

need not be signed by the user. The letter or identification form which accompanies the pass must be indorsed by the user and collected and filed with collected trip passes.

**Telegraph passes.**

34. Telegraph passes may be issued in cases of emergency only and shall be confined to one-way passage. The issuance of telegraph passes shall be over the name of one of the officers named in the list referred to in clause (*a*) in paragraph 3 or that of one of the countersigning officers referred to in paragraph 7, and only within the territory over which such officers have authority to issue annual, term, or trip passes.

35. Telegraph passes must be issued either on telegraph blanks in accordance with Form 8 or on a special printed form of telegraph pass, showing the same data as required on Form 8 but similar in form to trip passes.

36. Copies of telegraph passes and of the telegrams authorizing issuance of printed forms of telegraph passes must be made by the issuing officer and filed with the stubs or carbon copies of trip passes.

37. If, after a telegraph pass is used, a trip pass is substituted therefor, the former should be filed with requests for trip passes as the authority for issuing the latter.

38. Except as provided in the preceding paragraph, used telegraph passes must be filed with used trip passes.

**Tickets in lieu of passes.**

39. Detectives and others engaged in similar work and, in cases of emergency, employees and others entitled to free transportation, may be furnished with regular passenger tickets or may be permitted to purchase tickets and have the amounts paid therefor afterwards refunded. In such cases the ticket agent's report of the tickets "without value," or the vouchers refunding the amounts paid for the tickets, must be supported by the authority of one of the officers named in the list referred to in clause (*a*) in paragraph 3. Applications for refunds of fares paid or the authorities for such refunds must show the same information as is required to be shown on the requests for passes referred to in paragraph 22. When detectives and others engaged in similar work are known by number only and it is desired that their names shall not appear in the records, the numbers may be substituted for the names on the authorities referred to above. Carriers must be prepared to furnish adequate evidence that the persons so designated were actually engaged in the service shown on the authorities.

40. The use of a special form of free ticket according to the holder certain privileges or accommodations, such as meals, staterooms, berths, or the use of limited trains, is prohibited. If such form is desired it must be issued either in regular pass form or as a subdivision of one of the general classes as provided for in paragraph 2 (*b*).

**Record of free tickets issued.**

41. A complete record of all tickets issued in lieu of passes, including tickets for which the fares have been refunded as well as those issued free, must be maintained by carriers and filed in the office of the officer authorizing such issuance or refund. This record must show the date; form and number of ticket; stations from and to; name and address or other designation of person to whom issued; account of issuance (in accordance with par. 17); amount of fare; and name of officer authorizing the issuance of free ticket or refund of fare paid. (See Form 13.)

**Free transportation without passes.**

42. At the option of carriers, the following designated persons may be given passage, meals and sleeping, parlor, or other accommodations without passes, when in the actual performance of their duties:

Crews of trains, cars, and vessels.
Sleeping car, parlor car, and dining car employees.
Express messengers.
Baggage agents.
Newsboys on trains.

43. In cases of wrecks, epidemics, or other calamitous visitations, persons not prohibited by law from receiving free transportation may be accorded such transportation without passes. In such cases a general statement of the facts must be made by conductors or pursers and filed with reports of passes honored.

44. Passes need not be issued to a carrier's own employees for necessary travel in the performance of their duties in the transportation, maintenance, or construction work of the carrier requiring the movement of employees between points on its line of road, or for travel to and from such duties: provided that in lieu of passes such employees be supplied with checks, uniforms, badges, or other evidence which will establish their identity as bona fide employees entitled to receive passes; and provided further that instructions to recognize the particular means of identification which the carrier adopts be issued to conductors and ticket collectors and included in the carrier's general rules and instructions governing the issuance and use of passes referred to in paragraph 85.

45. Carriers are not required to issue passes for the free transportation wholly within any one municipality of their employees and others not prohibited by law from receiving free transportation; provided that persons so transported are distinguishable by badges, cap emblems, or uniforms indicative of their service.

**United States Post Office Department commissions.**

46. Commissions issued by the United States Post Office Department may be accepted for the passage of officers and employees of that department when traveling on official business. (See par. 74.)

**Transportation of caretakers.**

47. Pass forms must not be used for the transportation of caretakers of property. The transportation of caretakers is regarded as revenue transportation, the cost of which is included in the rates covering the charges on shipments for which caretakers are allowed.

48. Caretakers in actual charge of shipments of live stock, poultry, milk, or fruit, and traveling on trains or vessels with such shipments, shall be furnished with no other evidences of their rights to transportation than are contained in shipping contracts, or in identification papers to be used in connection with notations on waybills. If caretakers are permitted under the provisions of tariffs to travel on passenger trains immediately preceding or following shipments, they must be furnished with a form of caretaker's ticket, which must give full waybilling reference and conform to published tariff provisions.

49. If a caretaker's return passage is furnished under the terms of the shipping contract, it shall be provided for either by having the shipping contract executed at destination for return, or by having it lifted and a caretaker's return ticket issued, which must conform to published tariff provisions and show (*a*) the waybill or the shipping contract reference or (*b*) the initials and numbers of the cars, or the name of vessel, the shipping point, and the destination named in the contract.

50. In case shipments of milk are handled on tickets instead of waybills, caretakers' tickets must give full references to dates and numbers of the trains, or names of vessels, on which the shipments move.

51. All collected caretakers' tickets, shipping contracts, and identification papers on which caretakers are carried must be checked against the waybills or waybill records and filed in such manner as to be accessible and convenient for examination.

**Extension of time limit of passes.**

52. The time limit of a pass may be extended by an indorsement thereon, provided that appropriate record is maintained showing the final limit of passes so indorsed.

53. The time limit of outstanding annual or term passes may be extended, without indorsement, by the issuance of a general notice to that effect. If this is done, a copy of the notice shall be filed with the Commission and a copy shall be filed in the office in which are kept the records of the issuance of passes so extended and shall become a part of the records of passes issued.

**Records of passes issued.**

54. A complete record of each pass issued must be kept by carriers subject to these regulations. This record must supply information as indicated by the headings on the forms hereinafter prescribed

appropriate for the class of pass to be recorded, and such information must correspond with that appearing on the pass and request. In space provided for "Accommodations, etc.," on the record of annual and term passes issued must be shown all accommodations and services included on pass other than passage, such as drawing room, stateroom, berth, or meals. If passes, prepared for passage only, are indorsed as permitted in paragraph 2 (*c*) to include accommodations in addition to passage, similar indorsement must be made in the record of passes issued; if made on annual or term passes, it must appear in space for "Accommodations, etc.," on Form 10 or 11; if on trip passes, it must also appear on the stub or carbon copy of pass so indorsed.

55. Annual and term passes issued must be recorded on sheets or cards prepared similar to Forms 10 or 11.

56. If Form 10 is adopted, the passes must be entered either in numerical order or in alphabetical order according to the surnames of the persons to whom the passes are issued. When passes are entered in numerical order, an alphabetical index by names shall be maintained; when entered in alphabetical order, a numerical index showing name shall be maintained.

57. If Form 11 is adopted, the cards must be filed either in numerical order or in alphabetical order according to the surnames of the persons to whom the passes are issued. When cards are filed in numerical order, an alphabetical index by names shall be maintained; when filed in alphabetical order, a numerical index showing name shall be maintained. In lieu of the index required in this paragraph, if desired, records on this form may be made in duplicate with one set of cards filed in numerical order and the other set filed in alphabetical order according to the surnames of the persons to whom the passes are issued.

58. The numerical records or indexes referred to in paragraphs 56 and 57 must be kept separately by forms and series of passes; the alphabetical records or indexes may be kept either by forms and series of passes or in one complete alphabetical list for the entire issue.

59. Carriers may, if it is desired, keep an additional record of passes issued entered by departments, carriers, or otherwise, on Forms 10 or 11, but such additional record shall not substitute the complete alphabetical or numerical record or index required in paragraphs 56 and 57.

60. When the numbers of passes issued are shown in strict numerical order on requests received for annual and term passes, such requests may constitute the numerical index required in paragraphs 56 and 57, provided that any numerical index so maintained shall

be complete and shall contain not more than one series of numbers nor more than one form of pass.

61. The record of trip passes issued shall be kept on the stubs or carbon copies of trip passes. Full information must be shown on the stub or carbon copy of each trip pass, as provided on Forms 4, 5, and 6, and this information must conform to the data on the pass and coupon.

62. The record of commuter passes shall be kept on Form 10 or Form 11, if issued in card or book form, or on the stubs, if issued in coupon form with stub. These records must be maintained in the same manner as is provided for annual, term, or trip passes.

63. The record of telegraph passes issued on telegraph blanks shall be kept on Form 12. Such passes may be entered (*a*) in chronological order, (*b*) in alphabetical order according to surnames of persons to whom passes were issued, or (*c*) under departments, carriers, etc.

64. The record of telegraph passes issued on printed forms similar to trip passes shall be kept either on Form 12 or upon the stubs, if issued with stubs. In either event the full information required on Form 12 shall be shown.

65. If a pass is canceled, returned, or lost, the fact must be stated on the record, with the date of cancellation, return, or loss entered.

66. The records of passes issued must be filed in such manner as to be accessible and convenient for examination.

**Records of requests on other carriers for passes.**

67. Requests on other carriers for passes must be made in duplicate, or legible impression copies must be taken of them, and the duplicates or impression copies must be retained by the requesting carrier and filed in such manner as to be accessible and convenient for examination. When a pass is received, its number must be noted on the duplicate or impression copy of the request.

68. Notices received from other carriers advising of the issuance of passes under the provisions of paragraph 24 shall be filed in the office in which are filed copies of requests on other carriers for passes.

**Joint passes.**

69. A pass issued jointly by two or more carriers must show, in space provided for "Name of carrier," the names of each of the carriers concerned in such pass, and must also bear the autograph or facsimile signature of an officer named in the list referred to in clause (*a*) in paragraph 3, of each of the carriers interested. If all the signatures of such officers are facsimile signatures, the pass must be countersigned with ink by an officer or responsible subordinate of one of the carriers interested, who must be designated on the face of the pass.

70. If arrangements are made to accept or honor passes issued by other carriers over certain portions of a carrier's lines, such arrangements must be embodied in the pass rules and regulations referred to in paragraph 85, or a statement of the arrangements must be filed with the Commission.

**Filing passes.**

71. All passes collected and passes spoiled or returned must be filed in such manner as to be readily accessible and convenient for examination.

**Reports of passes honored.**

72. Reports, showing the use of passes, shall be made in accordance with the provisions of paragraphs 75 to 84, inclusive.

73. Travel performed on transportation certificates or similar authorities issued in accordance with the laws of a State which require designated officers to be accorded free transportation while on journeys entirely within the limits of such State, must be reported in the same manner as travel performed on annual or term passes.

74. Travel performed on commissions issued by the United States Post Office Department must be shown on conductor's or purser's report of passes honored, except when the holder is actually engaged in handling mail on the train or vessel.

**Reports of passes honored—Carriers by rail.**

75. Conductors or ticket collectors of carriers by rail must make reports of annual and term passes honored for each run on blank similar to Form 18 hereinafter prescribed, or on identification slips, as provided in paragraph 77. If desired, such reports may be combined with reports of revenue passengers, provided the required information is shown. It is optional with carriers by rail whether or not this report shall cover (*a*) passes issued to the employees of the reporting carrier and members of their families, (*b*) passes honored in suburban territory, and (*c*) passes honored for transportation wholly within any one city, town, or municipality. By the term "employees," as here used, is meant the officers and employees devoting substantially all their time to the work or business of the carrier and regularly carried on its pay rolls. By "suburban territory," as here used, is meant the territory adjacent to large centers to and from which there is a regular commuter travel.

76. Trip passes collected on rail lines, except as covered in clause (*a*), (*b*), or (*c*) of paragraph 75, shall in all cases be indorsed or punched so as to indicate the dates and numbers of trains on which used, and in addition thereto:

(*a*) If a trip pass, except as covered in clause (*a*), (*b*), or (*c*) of paragraph 75, is honored for passage between stations other than those named on its face and is collected, the conductor or ticket collector

shall indicate upon it by punch or indorsement the stations between which it actually is used.

(*b*) If a trip pass, except as covered in clause (*a*), (*b*), or (*c*) of paragraph 75, is honored for passage between stations other than those named on its face and is not collected, the conductor or ticket collector shall report the use of the pass on conductor's report, Form 18, or on identification slip, and in the same manner as provided for annual and term passes.

77. The use of identification slips and the form of such slips, if used, are left to the option of carriers by rail. If identification slips are used, and if they show the same information as required by conductor's report, Form 18, they may be substituted in lieu of the conductor's report.

78. Station numbers or letters instead of names may be used on conductors' reports and for indorsements on trip passes provided an official list of the symbols used is kept available for examination.

**Reports of passes honored—Carriers by water.**

79. Pursers or stewards of carriers by water must make reports of all passes honored and not collected for each trip on blank similar either to Form 20 or 21 hereinafter prescribed. If desired, Form 20 may be combined with the landing or identification check (as used in the collection of transportation at the time passengers disembark) and Form 21 may be combined with the reports of revenue passengers, provided the information required on Forms 20 and 21 is shown. It is optional with carriers by water whether or not these reports shall cover trip passes honored and collected.

80. A trip pass honored and collected, when not included in purser's report of passes honored, must be indorsed or punched by the ticket collector so as to indicate the date and name of vessel on which used, and the points between which used if other than those named on pass, and further, in the event that the pass includes sleeping or other accommodations, the stateroom or other accommodations furnished on the pass shall also be indicated by number or letter.

81. Where locked boxes are used in which ticket collectors deposit all collections as passengers disembark, reports of or indorsements on trip passes, as to date and name of vessel on which used, shall be made by either the ticket collector or by the employee whose duty it is to open and report the contents of such boxes.

82. It is optional with carriers by water whether or not reports shall be made covering passes honored over ferry lines when operated between points of close proximity.

**Reports of passes honored—Sleeping and parlor car accommodations.**

83. Conductors or ticket collectors of sleeping and parlor cars must make reports for each run of passes on which accommodations have been furnished, on blanks similar to Form 19 hereinafter prescribed or on reports prepared in columnar form, similar to Form 18, with headings to provide for the information required. If desired, Form 19 may be combined with reports of revenue passengers, provided the information required on Form 19 is shown. It is optional with carriers whether or not these reports shall cover trip passes honored and collected.

84. Trip passes collected and not included in conductors' reports of passes honored, must be indorsed or punched by the conductors or ticket collectors so as to indicate the dates on which used, the points between which used if other than those named on pass, the accommodations furnished thereon, the names or numbers of cars, and the route.

**Carriers' pass rules.**

85. Carriers must file with the Commission on or before January 1, 1917, copies of all their general rules and instructions then in effect governing the issuance and use of passes, if such have not been filed, and forward promptly copies of any subsequent rules and instructions. It is not intended, however, that carriers shall cause to be printed such rules or instructions for the specific purpose of filing them with the Commission.

**Pass and record forms.**

86. Passes must be issued and records kept substantially in accordance with the forms hereinafter prescribed. Except as provided for elsewhere in these regulations the forms indicate the nature of the information required and the order in which it shall appear. If, however, there is insufficient space on the face of any pass to show all the information required, reference may be made to the back of pass, where it shall be shown.

87. The dimensions of the forms contained in these regulations are not prescribed; however, in order to facilitate the filing of records it is recommended that Forms 16, 17, and 23 be prepared on paper 8 by 10½ inches.

88. Carriers may include any additional matter in the pass forms or record forms, but such additional matter must not be permitted to impair the information required in the prescribed forms or to affect the order in which it is given. The matter printed in italic type in the prescribed forms is not intended to be a part of the form but merely to indicate the nature of the information required.

89. Carriers may adopt additional record forms, but must file with the Commission a list of such forms, showing their use and their purpose, as provided in the Order on page 6.

90. For a special or unusual occasion—such as a convention of an association of railway employees, to attend which its members would use the lines of two or more carriers—when compliance with the foregoing regulations would be needlessly burdensome to the carriers concerned, consideration will be given by the Commission to an application from the initial carrier, made after an agreement with the other carrier or carriers over whose lines it is proposed to issue free transportation, for authority to issue a special form of pass, bearing coupons for the several carriers over whose lines the pass is to be effective.

**Form 1.**

**ANNUAL OR TERM PASS.**

**FOR PASSAGE ONLY.**

1917. (*Name of carrier.*) No. .....

Pass[1].....

Account[2].....

.....

Between[3].....

Until[4]..... 19.... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by.....

.....
(*Name and official title.*)

Countersigned by

.....

**Form 2.**

**ANNUAL OR TERM PASS.**

**FOR ACCOMMODATIONS, MEALS, ETC., BUT NOT INCLUDING PASSAGE.**

1917. (*Name of carrier.*) No. .....

This pass entitles[1].....

Account[2].....

.....

To occupy[5].....

Between[3].....

Until[4]..... 19.... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by.....

.....
(*Name and official title.*)

Countersigned by

.....

See notes relating to Forms 1 and 2 on page 26.

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

Form 3.

## ANNUAL OR TERM PASS.

### FOR PASSAGE, INCLUDING MEALS, BERTHS, OR OTHER ACCOMMODATIONS.

1917 (*Name of carrier.*) No. .....

Pass[1] .....

Account[2] .....

.....

Between[3] .....

Including[3] .....

Until[4] ..... 19.... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by .....

.....
(*Name and official title.*)

Countersigned by

.....

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

NOTES RELATING TO FORMS 1, 2, AND 3.

For annual or term passes to be issued for travel over the entire line or certain portions thereof, the word "between" may be omitted, and in the space provided may be printed "Over entire system," "Over all lines," "Over Eastern Division," etc.

If annual or term passes are to be issued over the autograph signature of an officer, the provision for countersignature may be omitted from such passes.

NOTE RELATING TO FORM 2:

Passes to include meals or accommodations, other than passage, in addition to sleeping or parlor accommodations may be printed "To" instead of "To occupy," so that a pass as issued may read, "To meals and stateroom."

NOTE RELATING TO FORM 3:

Passes may be printed to read "Including meals and berth" or to indicate such other accommodations as are to be included with passage.

**Form 4.**

**TRIP PASS.**

**FOR PASSAGE ONLY.**

| (*Name of carrier.*) | (*Name of carrier.*) | (*Name of carrier.*) |
|---|---|---|
| No. ..... | No. ..... | No. ..... |
| TRIP PASS STUB. | TRIP PASS. | TRIP PASS. |
| ....., 19.. | Pass[1]..... | (Subject to conditions on back.) |
| Pass[1]..... | Account[2]..... | ....., 19.. |
| Account[2]..... | ..... | Pass[1]..... |
| ..... | From[3]..... | Account[2]..... |
| From[3]..... | To[3]..... | ..... |
| To[3]..... | Void if detached. | From[3]..... to[3]..... |
| And return. | Issued by..... | Good for one trip only until[4]... |
| Address..... | | ....., 19.. |
| Expires[4]..... | | Valid when countersigned by |
| Requested by..... | | ..... |
| Issued by..... | | ..... |
| | | (*Facsimile signature.*) |
| | | ..... |
| | | (*Official title.*) |
| | | Countersigned by |
| | | ..... |

See notes relating to this form on page 29.

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.

**Form 9.**

**TRIP PASS.**

**FOR ACCOMMODATIONS, MEALS, ETC., BUT NOT INCLUDING PASSAGE.**

| *(Name of carrier.)* | *(Name of carrier.)* | *(Name of carrier.)* |
|---|---|---|
| No. ..... | No. ..... | No. ..... |
| TRIP PASS STUB | TRIP PASS | TRIP PASS |
| ..... 19.. | This pass entitles[1] ..... | (Subject to conditions on back) |
| Pass entitling[1] ..... | Account[2] ..... | ..... 19.. |
| Account[2] ..... | ..... | This pass entitles[1] ..... |
| ..... | To occupy[3] ..... | Account[2] ..... |
| To occupy[3] ..... | From[3] ..... | ..... |
| From[3] ..... | To[3] ..... | To occupy[3] ..... |
| To[3] ..... | Void if detached | From[3] ..... to[3] ..... |
| And return | Issued by ..... | Expires[4] ..... 19.. |
| Address ..... | | Valid when countersigned by |
| Expires[4] ..... | | ..... |
| Requested by ..... | | ..... |
| ..... | | *(Facsimile signature.)* |
| Issued by ..... | | ..... |
| ..... | | *(Official title.)* |
| ..... | | Countersigned by |
| ..... | | ..... |
| ..... | | ..... |

See notes relating to this form on page 29.

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

**Form 6.**

**TRIP PASS.**

**FOR PASSAGE, INCLUDING MEALS, BERTHS, OR OTHER ACCOMMODATIONS.**

| *(Name of carrier.)* | *(Name of carrier.)* | *(Name of carrier.)* |
|---|---|---|
| No. ..... | No. ..... | No. ..... |
| TRIP PASS STUB. | TRIP PASS. | TRIP PASS. |
| ....., 19.. | Pass [1] ..... | (Subject to conditions on back.) |
| Pass [1] ..... | Account [2] ..... | ....., 19.. |
| Account [2] ..... | ..... | Pass [1] ..... |
| ..... | From [3] ..... | Account [2] ..... |
| From [3] ..... | To [3] ..... | ..... |
| To [3] ..... | Including [5] ..... | From [3] .....to [3] ..... |
| And return. | Void if detached. | Including [5] ..... |
| Including [5] ..... | Issued by ..... | Good for one trip only until [4] |
| Address ..... | | ....., 19.. |
| Expires [4] ..... | | Valid when countersigned by |
| Requested by ..... | | ..... |
| Issued by ..... | | ..... *(Facsimile signature.)* |
| | | ..... *(Official title.)* |
| | | Countersigned by |
| | | ..... |

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

NOTES RELATING TO FORMS 4, 5, AND 6:

Trip passes may be provided with a second sheet for carbon copies in lieu of the pass stub. In such cases the carbon copies must be numbered to correspond with the passes, and must show the full information required on the stub.

The trip pass may so be prepared as to permit, by using carbon paper, the filling in of all information required on the stub, the going portion, and the return portion of the pass, by one writing. One coupon of such passes may read "To ..... from ....." instead of "From ..... to ....." as shown on forms 4, 5, and 6.

Trip passes may, if preferred, be limited by a system of dates along the margin, the limits to be indicated by punching or by tearing off dates later than that on which the pass expires.

NOTE RELATING TO FORM 5:

Passes to include meals or accommodations, other than passage, in addition to sleeping or parlor accommodations may be printed "To" instead of "To occupy," so that the pass as issued may read "To meals and stateroom."

NOTE RELATING TO FORM 6:

Passes may be printed to read "Including meals and berth" or to indicate such other accommodations as are to be included with passage.

**Form 7.**

**COMMUTER PASS.**

(*Name of carrier.*) No. .....

[1] ..... TRIP PASS.

Pass [2] .....

Account [3] .....

.....

Between [4] .....

Until [5] ....., 19... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by .....

.....
(*Name and official title.*)

Countersigned by

.....

[1] See paragraph 2 (*a*) Commuter passes.
[2] See paragraphs 14, 15, and 16.
[3] See paragraph 17.
[4] See paragraph 19.
[5] See paragraph 20.

NOTES RELATING TO FORM 7.

Commuter passes may be issued either in coupon form, with a separate coupon for each ride, or in card form with numbers on the margin, one of which is to be punched for each ride. The card pass, or the last coupon or cover of book (if issued in coupon form), must contain the information indicated on this form.

Electric railways may provide coupons on this form, each of which represents an equivalent in free transportation of a specified amount of fare.

**Form 8.**

**TELEGRAPH PASS.**

(See paragraphs 34 to 38, inclusive.)

.....

.....

This telegram, when written in ink and countersigned by you, will pass [1].....

.....from [2]..... to [2].....

account [3].....if used within [4].....days.

.....

(*Name of issuing officer.*)

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 19.
[3] See paragraph 17.
[4] See paragraph 20.

**Form 9.**

**RECORD OF PASS STOCK RECEIVED AND DISTRIBUTED.**

(See paragraph 12.)

DEBIT. Form..... CREDIT.

| Stock received. | | | | Stock distributed. | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Date. | Consecutive numbers. | | Number. | Date. | Furnished to— | | Consecutive numbers. | | Number. |
| | Commencing. | Closing. | | | Name. | Title. | Commencing. | Closing. | |
| | | | | | | | | | |

**Form 10.**

**RECORD OF ANNUAL AND TERM PASSES ISSUED—BOOK RECORD.**

(See paragraphs 54 to 66, inclusive.)

| Form..... | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Date issued. | No. | To whom issued. | | | Accommodations, etc. | Territory. | Date of expiration. | Request of— | Remarks. |
| | | Name. | Address. | Account. | | | | | |
| | | | | | | | | | |

NOTE RELATING TO FORM 10:

Carriers issuing passes for passage only are not required to provide the space for "Accommodations, etc.," on Form 10.

**Form 11.**

**RECORD OF ANNUAL AND TERM PASSES ISSUED—CARD RECORD.**

(See paragraphs 54 to 66, inclusive.)

..... Form..... No.....

Name.....

Address.....

Account.....

Accommodations, etc.....

Territory.....

Date of expiration.....

Request of.....

Date issued.....

Remarks.....

NOTES RELATING TO FORM 11:

Carriers issuing passes for passage only are not required to provide the space for "Accommodations, etc.," on Form 11.

In order to facilitate the preparation of such passes and records as are prepared on paper thin enough to secure two legible carbon copies, the records and indexes of passes issued may be made in that manner. In such cases and by preparing record forms sufficiently longer than the pass forms, the information not required on the pass form may be shown at the right of the information which is required, viz: "Address" on the line with "Name"; "Request of" on the line with "Account"; "Date issued" on the line with "Territory"; and "Remarks" on the line with "Date of expiration."

**Form 12.**

**RECORD OF TELEGRAPH PASSES ISSUED.**

(See paragraphs **54 to 66**, inclusive.)

| Date issued. | To whom issued. | | | From— | To— | Issued by— | Remarks. |
|---|---|---|---|---|---|---|---|
| | Name. | Address. | Account. | | | | |
| | | | | | | | |

**Form 13.**

**RECORD OF FREE TICKETS ISSUED.**

(See paragraph 41.)

| Ticket. | | | Station from— | Station to— | To whom issued. | Address. | Account. | Amount of fare. | Authorized by— | Remarks, file no., etc. |
|---|---|---|---|---|---|---|---|---|---|---|
| Date. | Form. | No. | | | | | | | | |
| | | | | | | | | | | |

**Form 14.**

**REQUEST FROM CARRIER'S OFFICERS AND EMPLOYEES FOR PASSES.**

**PASSAGE ONLY.**

(See paragraphs 21 and 22.)

.....Company,

OFFICE OF.....,

....., 191..

.....

.....

.....

DEAR SIR: Please furnish pass for.....

.....

Address.....

Account of.....

From.....

To.....,and return.

Limited to.....

([1]).....
*(Signature.)*

.....
*(Title or occupation.)*

Approved.

.....

Pass No.[2]..... issued.

[1] See paragraph 27. [2] See paragraph 26.

NOTE RELATING TO FORM 14:
This form may be extended so as to cover two or more passes.

**Form 15.**

**REQUEST FROM CARRIER'S OFFICERS AND EMPLOYEES FOR PASSES.**

**PASSAGE AND ACCOMMODATIONS, OR ACCOMMODATIONS ONLY.**

(See paragraphs 21 and 22.)

.....Company.

OFFICE OF .....

....., 191..

.....

.....

.....

DEAR SIR: Please furnish pass for .....

.....

Address.....

Account of.....

To occupy.....

From.....

To.....and return.

Including.....

Limited to.....

(1).....
*(Signature.)*

.....
*(Title or occupation.)*

Approved.

.....

Pass No.[2].....issued.

[1] See paragraph 27. [2] See paragraph 26.

NOTES RELATING TO FORM 15:

This form may be extended so as to cover two or more passes.

Requests for passes for passage and accommodations need not be provided with the space "To occupy" on Form 15. (See par. 18b.)

Requests for passes for accommodations only need not be provided with the space "Including" on Form 15. (See par. 18a.)

**Form 16.**

**REQUEST ON ANOTHER CARRIER FOR TRIP PASSES.**

(See paragraphs 21, 22, 67, and 87.)

.....Company.

OFFICE OF.....,

....., 191..

.....

.....

.....

DEAR SIR: Will you kindly favor me, on account of this company, with trip pass..for the following person.., who.....not prohibited by law from receiving free transportation: [1].....

.....

Name.....

Address.....

Account of.....

From.....to.....and return.

Limited to.....

This request shall be valid only when countersigned by myself or by.....

My name is on file with the Interstate Commerce Commission.

([2]) .....
*(Facsimile signature of officer.)*

.....
*(Title.)*

Countersigned by:

.....

Pass No.[3].....issued.

[1] On requests drawn on other carriers for accommodations, but not including passage, in this space must be shown the character of accommodations requested; as, "to occupy one berth." On requests for passes to include both passage and accommodations, in this space must be shown the character of accommodations and a statement that passage also is desired; as, "to occupy one stateroom in addition to passage."

[2] See paragraph 28.

[3] See paragraphs 26 and 67.

NOTES RELATING TO FORM 16:

The provision for countersignature on Form 16 is not required when such forms are to bear autograph signature.

This form may be extended so as to cover two or more passes.

**Form 17.**

**REQUEST ON ANOTHER CARRIER FOR ANNUAL OR TERM PASSES.**

(See paragraphs 21, 22, 67, and 87.)

.....Company,

OFFICE OF.....,

....., 191..

.....

.....

.....

DEAR SIR: Will you kindly favor me, on account of this company, with..... (*Annual or term.*) pass....for..... (*Period or year.*) over your line for the following person.., who..... not prohibited by law from receiving free transportation: [1].....

.....

| Number of pass issued.[2] | Name. | Title or occupation. | Address. | Territory. | Remarks, etc.[3] |
|---|---|---|---|---|---|
| | | | | | |

This request shall be valid only when countersigned by myself or by.....

My name is on file with the Interstate Commerce Commission.

([4]) ..... (*Facsimile signature of officer.*)

..... (*Title.*)

Countersigned by:

.....

[1] On requests drawn on other carriers for accommodations, but not including passage, reference must be made in this space to the character of accommodations requested; as, "to occupy space as indicated below." On requests for passes to include both passage and accommodations in this space reference must be made to the character of the accommodations requested and a statement that passage also is desired; as, "to occupy space as indicated below in addition to passage."

[2] See paragraphs 26 and 67.

[3] In column headed "Remarks, etc.," shall be shown the character of any accommodations requested other than passage.

[4] See paragraph 28.

NOTE RELATING TO FORM 17:

The provision for countersignature on Form 17 is not required when such forms are to bear autograph signature.

**Form 18.**

## CONDUCTOR'S REPORT OF PASSES HONORED.

### STEAM ROADS AND ELECTRIC RAILWAYS.

(See paragraphs 75 to 78, inclusive.)

(*Name of carrier.*)

Train No..... Date.....

Train run, from.....to.....

..... (*Conductor or other employee.*) Punch. ☐

| Form or kind of pass. | Pass No. | In favor of— | Honored on this train. | | No. persons. | Remarks: Stop-offs, etc. |
|---|---|---|---|---|---|---|
| | | | From— | To— | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

**Form 19.**

## CONDUCTOR'S REPORT OF PASSES HONORED.

### SLEEPING AND PARLOR CAR ACCOMMODATIONS.

(See paragraphs 83 and 84.)

(*Name of carrier.*)

Form or kind of pass..... No.....

Car..... Line.....

Accommodations [1].....

From.....

To.....

Date.....

In favor of.....

..... (*Conductor or other employee.*)

[1] The drawing-room, section, berth, etc., furnished on pass shall be indicated by number or letter.

**Form 20.**

## PURSER'S REPORT OF PASSES HONORED.

### CARRIERS BY WATER.

(See paragraphs 79 to 82, inclusive.)

(*Name of carrier.*)

Date [1] .....

Name of vessel [1] .....

Sailing, from [2] ..... to [2] .....

Pass honored on this trip } from ..... to .....

Form or kind of pass .....

Pass number .....

In favor of .....

Number of persons .....

Accommodations, etc.[3] .....

Remarks .....

.....
(*Purser or other employee.*)

[1] Date and name of vessel may be shown on back if dating stamp is used showing such information.

[2] Termini of run may be printed or stamped and the form prepared so as to read, "Between ..... and .....," providing direction of trip is shown, as northbound, eastbound, etc.

[3] Any accommodations included on pass, other than passage, must here be shown. The berths, staterooms, etc., furnished shall be indicated by number or letter.

Form 21.

## PURSER'S REPORT OF PASSES HONORED.

### CARRIERS BY WATER.

(See paragraphs 79 to 82, inclusive.)

(*Name of carrier.*)

Date.....

Name of vessel.....

Sailing from.....to.....

.....

(*Purser or other employee.*)

| Accommodations, etc. | In favor of— | Form or kind of pass. | Pass No. | Honored on this trip. | | Number of persons. | Remarks. |
|---|---|---|---|---|---|---|---|
| | | | | From— | To— | | |
| (1) | | | | | | | |
| (2) | | | | | | | |

[1] The stateroom or berth number may be printed on the form and the required information entered opposite such number.

[2] Any accommodations included on pass, other than passage, must here be shown. The staterooms, berths, etc., furnished shall be indicated by number or letter.

**Form 22.**

**ACKNOWLEDGMENT OF PASSES ISSUED WITHOUT WRITTEN REQUEST.**

(See paragraph 24.)

Date.....

... ..... .....

.....

.....

Receipt is hereby acknowledged of

..... .....
(*Name of carrier.*) (*Annual or term.*)

Pass No....., in favor of the following person.., who.....not prohibited by law from receiving free transportation:

Name.....

Address.....

Account of.....

Territory.....

Limited to.....

.....

NOTES RELATING TO FORM 22:

This form may be extended so as to cover two or more passes.

Forms 22 and 23 may be prepared so that the two forms and the necessary carbons may be made at one writing.

**Form 23.**

**NOTIFICATION OF PASSES ISSUED WITHOUT WRITTEN REQUEST.**

(See paragraphs 24, 25, and 87.)

Date.....

.....

.....

.....

Notice is hereby given of the issuance of

..... .....
(*Name of carrier.*) (*Annual or term.*)

Pass No. ....., in favor of the following person.., who ..... furnished such transportation without written request from your company:

Name.....

Address.....

Account of.....

Territory.....

Limited to.....

.....
(*Name of officer issuing pass.*)

NOTES RELATING TO FORM 23:

This form may be extended so as to cover two or more passes.

Forms 22 and 23 may be prepared so that the two forms and the necessary carbons may be made at one writing.

[fol. 91] IN UNITED STATES DISTRICT COURT.

ORDER—RE SUBMISSION FOR FINAL DETERMINATION—December 20, 1929

Came the United States of America, by Elmer B. Collins, its counsel, and tendered its Answer herein, which is ordered to be filed.

Then came counsel for the plaintiff and tendered two copies of notice to the Interstate Commerce Commission and the Attorney General of the United States to the effect that at 10:30 o'clock upon th morning of December 20, 1929, at the United States Court room, Louisville, Kentucky, an application would be made to the District Court of the United States for an interluctory injunction herein. One of said notices is accepted by Elmer B. Collins, Special Assistant to the Attorney General; the other by Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission. Both of said notices are ordered to be filed.

Then both sides announced ready for trial. The case was stated by counsel for the respective parties and certain documents filed as evidence with Clarence E. Walker, Official Stenographer. The hearing having been concluded, it is ordered that this case be submitted for final determination.

The plaintiffs are given one week from and after this date to file brief and furnish counsel for defendants a copy thereof; and the defendants are given one week after receipt of such copy to file their brief herein.

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[fol. 92] IN UNITED STATES DISTRICT COURT

ANSWER OF UNITED STATES—Filed Dec. 20, 1929

United States, one of the above-named defendants, for answer to the petition filed herein against it says:

I.

United States admits the allegations made and contained in the opening paragraph and paragraphs numbered 1 to 5, inclusive, of the petition, with this exception:

(a) It has not sufficient knowledge or information to form a belief concerning the truth of the allegation made in the opening paragraph, that petitioners sue on behalf "of all other carriers subject to the Interstate Commerce Act which may have an interest in the premises," and, therefore, United States neither admits nor denies that allegation.

II

United States, for answer to the first paragraph of subdivision numbered 6 of the petition, admits that the allegation therein is substantially correct; but respectfully refers to the language of paragraph (7) of Section 1, and of Section 22, of the Interstate Commerce Act for the full and complete provisions thereof.

[fol. 93] Answering the second paragraph of said subdivision, United States denies the truth of the allegation therein contained insofar as it alleges that petitioners have exchanged free tickets and passes calling for similar, or an equivalent amount of free transportation.

III

United States denies the allegations made and contained in subdivisions numbered 7, 8 and 9 of the petition, except this: It admits the allegation in subdivision 7, that it is the right of the carrier issuing a free pass, free ticket or other evidence of free transportation, to transport free over its line persons lawfully holding such free pass, free ticket, or other evidence of free transportation.

IV

United States, for its answer to subdivision numbered 10 of the petition, says:

The allegation therein, that the practice of moving persons entitled to use, and using, free transportation in the private or business car of another carrier free and without imposing any charge for the movement of the car, has always been well known to the Commission, is incompetent, irrelevant, and immaterial, and, United States, therefore, neither admits nor denies said allegation; but, United States denies that the Commission has ever either impliedly or expressly recognized such practice as lawful.

United States admits that the portions of paragraph (6) of Section 1 and of paragraph (1) of Section 6 of the Interstate Commerce Act, set forth in that subdivision, are cor-
[fol. 94] rect copies in part of the provisions of said paragraphs; and, further, admits and alleges that at the time of its decision involved herein, tariffs filed with the Commission failed in most cases to cover definitely and clearly the transportation by carriers, subject to the Interstate Commerce Act, of the private or business cars of other carriers subject to the Act, in passenger service; and denies the allegation that no tariff covering such transportation "has ever been filed with the Commission, as the Commission has well known."

United States says that the allegation that "no requirement was ever made by the Commission, up to the time of its order in this proceeding, that any such tariff should be filed" is incompetent, irrelevant, and immaterial, and, therefore, it neither admits nor denies that allegation.

United States admits that the Commission's Conference Rulings, before they were rescinded, as hereinafter mentioned, prescribed the form of pass set forth in said subdivision; but denies that said subdivision contains an accurate and complete statement in respect of the form of pass prescribed by the Commission's Regulations to Govern the Form and Recording of Passes, Issue of 1917.

United States denies that the Commission's Conference Rulings and Regulations to Govern the Form and Recording of Passes, either by prescribing a form of pass or in any other way, recognized the lawfulness of the practice of moving persons entitled to use, and using, free transportation in the private or business car of another carrier free and without imposing any charge for the movement of the car; and, further, denies that Congress, in reenacting paragraph (7) of Section 1 and Section 22 of the Interstate Commerce Act, either ratified or adopted an interpretation of those provisions of law which would permit of, and recognize as lawful, said practice.

[fol. 95] United States admits that said Conference Rulings were rescinded by the Commission's order of December 26, 1928; and that said Regulations to Govern the Form and Recording of Passes were amended by the Commission's order of July 30, 1929.

For further answer to said subdivision 10, United States denies that said order of July 30, 1929, is an order within the meaning of paragraph (8) of Section 16 of the Interstate Commerce Act; and alleges that the provisions of said paragraph (8) of Section 16 are applicable only to orders made under Sections 3, 13 or 15 of said Act; and that said order of July 30, 1929, was not made under any of those sections, but was made under Section 20 of said Act in that it was an amendment to the Commission's Regulations to Govern the Form and Recording of Passes which had been prescribed in accordance with said Section 20.

V

United States admits the allegations made in subdivision numbered 11 of the petition.

VI

United States denies the allegations made and contained in subdivision 12 of the petition.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

John Lord O'Brian, Assistant to the Attorney General; Elmer B. Collins, Special Assistant to the Attorney General; Thos. J. Sparks, United States Attorney.

[fol. 96] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

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[fol. 97] In United States District Court

Order Filing Oral Stipulation—Jan. 9, 1930

Came Clarence E. Walker, shorthand reporter, and tendered a stipulation orally stated by Daniel W. Knowlton, attorney for the Interstate Commerce Commission, at the hearing on December 20, 1929, and then agreed to by

counsel representing all parties, which stipulation is ordered to be filed and made part of the record.

Chas. H. Moorman, Circuit Judge; Smith Hickenlooper, Circuit Judge; Chas. I. Dawson, District Judge.

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[fol. 98] In United States District Court

Stipulation Orally Stated by Mr. Knowlton on the Hearing of this Case December 20th, 1929 and Agreed to by all the Counsel in the Case—Filed Jan. 9, 1930

The Commission's denial on page 5 of its answer of petitioners' allegation that no tariff of the character described in the petition has ever been filed with the Commission as the Commission has well known, was merely for the purpose of making its answer conform to the Commissioner's report herein involved. On pages 787 to 788 of its report the Commission discusses what is shown generally by the tariffs on file with it relating to charges on private cars, including provisions with respect to special, privately-owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers." But it farther states that the provisions so described "are the provisions generally in effect, although there may be variations on individual lines." Except for such possible variations on *on* individual lines, it is stipulated that the tariffs now and at the time of its report on file with the Commission do not and did not name charges for the movement by one carrier subject to the Interstate Commerce Act of the private or business passenger cars of another such carrier when occupied by a person entitled to use, and using free transportation.

It is, of course, not intended to admit hereby that if a carrier-owned car is chartered to some other person and company and is being moved as a chartered car, it is taken out of the tariff relating to it, if it happens in addition to be carrying a person entitled to use and using free transportation.

[fol. 99] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 100] IN UNITED STATES DISTRICT COURT

ORDER FILING CERTAIN DOCUMENTS—January 9, 1930

Came petitioners, by E. S. Jouett, counsel, and tendered the following documents, which are ordered to be filed and made part of the record herein, to-wit:

(1) Conference Ruling No. 95.

(2) Pages 6796-97 of Senate Document No. 466, 63rd Congress, Second Session; from the Senate Print of the Commissioner's Record in the Five Percent case.

(3) The Report of the Commission in the Tap Line Case.

(4) The Report of the Commission in the Colorado Free Pass Investigation.

(5) The Report of the Commission in the Five Percent Case.

Chas. H. Moorman, Circuit Judge; Smith Hickenlooper, Circuit Judge; Chas. I. Dawson, District Judge.

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[fol. 101] IN UNITED STATES DISTRICT COURT

ORDER SETTING ASIDE ORDER OF SUBMISSION, ETC.—January 31, 1930

Came the petitioners by counsel and moved the Court to set aside the order of submission heretofore entered and to grant them leave to file herein a certified copy of the record before the Interstate Commerce Commission in their Docket No. 17757 entitled "In the Matter of the Use of Private Passenger Train Cars" involved in this suit.

It appearing to the satisfaction of the Court that the defendants waived notice of the hearing of this motion, and the Court being advised thereon, it is ordered that the order of submission herein be and it is set aside and that the petitioners be and they are granted leave to file the Interstate Commerce Commission record above mentioned.

And it further appearing that a copy of this record has been ordered but that it is voluminous and it is not known just when it will be ready, it is ordered that same be filed not later than five days after it is certified by the Secretary

of the Interstate Commerce Commission and delivered to counsel for petitioners.

It appearing to the Court that none of the parties to this cause desire opportunity for further hearing, it is now ordered that upon the filing of the above mentioned record this case stand resubmitted to the Court for decision.

Chas. H. Moorman, Circuit Judge; Smith Hickenlooper, Circuit Judge; Chas. I. Dawson, District Judge.

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[fol. 102] In United States District Court

Opinion—Filed May 28, 1930

Before Moorman and Hickenlooper, Circuit Judges, and Dawson, District Judge

Per curiam: In this action the plaintiffs seek to enjoin the enforcement of an order of the Interstate Commerce Commisison, made and entered on the 4th day of November, 1929, requiring the plaintiffs and all other carriers subject to the Commission's jurisdiction to cease and desist from transporting private passenger train cars, including so-called office cars, of other carriers, free, or at other than published tariff rates, and to enjoin and set aside a regula-[fol. 103] tion of the Commission, made and entered on the 30th day of July, 1929, prohibiting the issual of car passes, except for cars owned by the issuing carrier, or held by it under lease for use in its business as a common carrier, and except for cars of lines operated as a part of the system of the issuing carrier. The validity of the regulation complained of is dependent upon whether or not the Commission had the authority to issue the order of November 4, 1929, referred to.

The order of November 4, 1929, was issued as the result of a proceeding in the so-called Private Passenger Car case, No. 17757, instituted on the Commission's own motion, as authorized by Section 13 (2) of the Interstate Commerce Act. A questionnaire was sent to all Class I and Class II carriers and to switching and terminal carriers, calling for information relative to the movement, handling and use of private passenger train cars, owned, leased or operated on

home and foreign lines. Sworn returns were filed by three hundred and eighty-seven carriers of the United States, covering the calendar years 1923, 1924 and 1925. A proposed report was served upon the plaintiffs and upon all other carriers affected, and, within the time allowed, exceptions were filed by the Association of Railway Executives, on behalf of its membership, based upon substantially the same contentions as are advanced by the plaintiffs in this proceeding. After a full hearing, the Commission issued its report on June 21, 1929. Its findings and conclusions are summarized in the syllabus of the report as follows:

"1. The transportation or movement of private passenger cars, including so-called office cars, by one carrier for [fol. 104] another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act.

2. It is unjustly discriminatory and unduly preferential and prejudical to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenue for the movement of privately owned or chartered cars.

3. The transportation of persons in private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial."

The exceptants to the report having waived any further hearing, the Commission, on the 4th day of November, 1929, entered the order complained of. The order recites as its basis the findings and conclusions set out in the Commission's report.

The plaintiffs are not complaining of the third finding summarized in the syllabus of the report, and repeated in the order, but profess their willingness to correct the practice therein condemned in a manner satisfactory to the Commission. Their objections are addressed to the findings summarized in the first and second headings of the syllabus, and to the order of the Commission commanding a cessation of the practices therein condemned as illegal. There has been filed as a part of the record in this case the entire

record considered by the Interstate Commerce Commission, and the case is before us on final submission.

There is no disagreement as to the facts. The sole question is whether or not the Interstate Commerce Commission, under the law, has the authority to deal with the matters attempted to be dealt with in the order complained of.

[fol. 105] The applicable law is found in Section 1(7), Section 22(1), Section 6(1)(7), Section 2 and Section 3(1) of the Interstate Commerce Act, as amended by the Transportation Act of 1920. The pertinent parts of Section 1(7) and Section 22(1) are as follows:

Section 1(7). "No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians and attorneys at law; * * * Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employees of common carriers and their families; * * *"

Section 22(1). "Nothing in this chapter shall prevent the carriage, storage or handling of property free, or at reduced rates, for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, * * * Nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; * * *"

Section 6(1) requires every common carrier subject to the provisions of the Act to file with the Interstate Commerce Commission, and to print and keep open to public inspection, its schedule of fares and rates for the transportation of passengers and property, and Section 6 (7) prohibits any common carrier subject to the provisions of the Act from engaging or participating in the transportation of passengers or property, unless the fares, rates and charges upon which the same are transported by such car-

rier have been filed and published as provided in Section 6(1), and further prohibits any departure from the published schedules.

[fol. 106] Section 2 and Section 3(1) of the Act are as follows:

Section 2. "If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3(1). "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As shown by its report, the Commission proceeded upon the theory that a private passenger train car or office car of one carrier, when hauled over the line of another carrier, and occupied by an officer or employee of the owning road holding a pass issued by the moving carrier, moves as an article of commerce, and not as a transportation facility of the moving carrier, and that therefore it can not be moved by such non-owning carrier over its line, except in strict compliance with Section 6(1)(7) of the Interstate Commerce Act, hereinbefore referred to. Having reached

the conclusion that the movement of such car on the line [fol. 107] of a non-owning carrier is the transportation for another of an article of commerce by such carrier, rather than the use by the moving carrier of a transportation facility, the Commission found that its free transportation by such non-moving carrier constitutes an unjust discrimination, denounced in Section 2 of the Act, and the giving of an undue and unreasonable preference and advantage, prohibited by Section 3 of the Act.

Starting with the premise that a common carrier has the right, under Section 1(7) and Section 22(1) of the Interstate Commerce Act, to exchange passes with other common carriers for their officers, employees and their families, and the further premise that the Interstate Commerce Commission has no authority under the law to control the method or plan by which a carrier acquires its facilities of transportation, the plaintiffs argue that when a common carrier exercises its legal right to issue a pass to an officer or employee of another common carrier, or to members of their families, in exchange for a like courtesy, it has the right to transport such pass holder in whatever appropriate vehicle it may see fit to use; that it may haul such pass holder in one of its own cars, in a leased car, or in a car owned by the carrier of which the pass holder is an officer or employee, and lent to the moving carrier for the purpose of transporting the pass holder; that from whatever source the car may be obtained it is a transportation facility of the moving carrier and not an article of commerce for the movement of which it must charge the owning carrier the published tariff rate.

The plaintiffs further contend that the provisions of the Interstate Commerce Act, requiring the filing and publication of tariff schedules, and adherence thereto, and the provisions of Sections 2 and 3 of the Act, against unjust dis- [fol. 108] crimination and undue or unreasonable preferences, have no application to persons or property which the law permits to be moved free or at reduced rates.

It is further argued that the alleged long-continued sanction by the Interstate Commerce Commission of the practice condemned in the order complained of constitutes a binding interpretation of the Act as permitting the practice now condemned, and that Congress, in re-enacting the

Act's provisions with reference to passes and reduced rates, has impliedly adopted such interpretation.

The Commission being a creature of statute, of course has only such powers as are delegated to it by statute and such powers as are impliedly within its delegated powers. It is thoroughly settled that the Commission has no power to control the judgment of the carrier in the method it adopts to supply itself with the necessary equipment to perform its duties as a common carrier of passengers. It is free to own, lease or borrow its equipment. Chicago, St. Louis & New Orleans R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79; Scofield v. Lake Shore & Michigan Southern Ry. Co., 2 I. C. C. 118; Worchester Excursion Car Co. v. Pennsylvania R. R. Co., 3 I. C. C. 584. Therefore, when a carrier issues its pass to an officer or employee of another carrier, it has the right to perform its contract of carriage of the pass holder in equipment of its own in leased or in borrowed equipment. The right to thus acquire its equipment, however, does not imply the right to so use such equipment as to give the pass holder passenger an undue preference or advantage over paying passengers.

It was the purpose of Congress, in enacting the Inter- [fol. 109] state Commerce Act, to strike down all forms of unjust discrimination, favoritism and inequality on the part of common carriers in the performance of their duties as such. No common carrier subject to the provisions of the Act has a right to give, and no person has a right to accept from such carrier, any undue preference or advantage. Any act or practice which may be reasonably construed as an unjust discrimination or as an undue preference or advantage, is undoubtedly a matter within the the jurisdiction and subject to the control of the Commission, unless authority for such act or practice can be found in the Act itself. New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commisison, 200 U. S. 361; L. & N. R. R. Co. v. Mottley, 219 U. S. 467. In determining if a particular act or practice is excepted from the provisions of the Act, the Act should not be liberally or loosely construed, for the purpose of enlarging the meaning of the exceptions therein contained, but, in view of the cardinal purpose of the Act to prohibit unjust discriminations and unreasonable preferences, all exceptions should be strictly

construed, and the words of the exceptions should be given their usual and ordinary meaning.

But for the exceptions found in Section 1(7) and Section 22(1), a common carrier subject to the provisions of the Act would have no right to give a pass to any person, and the giving of such a pass would undoubtedly be a violation of Sections 2 and 3 of the Act. The exceptions found in Sections 1(7) and 22(1) are simply a statutory declaration that the giving of passes to the classes therein named shall not be considered as an unjust discrimination under Section 2, nor as an undue or unreasonable preference under Section 3. However, when Congress authorized the carriers affected by the Act to give free tickets or passes to [fol. 110] their own officers and employees and their families, and to exchange with other such carriers passes for their officers and employees, we must assume that Congress used the words "free ticket", "free pass" and "pass" in the sense that those words are commonly and ordinarily understood. A pass or a free ticket, as ordinarily understood, connotes free transportation in the ordinary way and with the usual conveniences afforded the paying public. To construe the permission to grant free passes and free tickets, contained in Section 1(7) and Section 22(1), as authorizing not only free transportation of the holder, but transportation in a private car with all the conveniences thereof, would amount to a distortion of the language used and a perversion of the central purpose of the Act. A fair interpretation of the two sections referred to, when they are read in connection with the other provisions of the Act, is that they authorize the giving of free transportation to the persons therein named, with jurisdiction in the Commission to determine if the method of transporting the pass holder, and the conveniences afforded him, constitute an unjust discrimination, prohibited by Section 2, or the giving of an undue or unreasonable preference, within the meaning of Section 3 of the Act.

Construing the Act in this way, it seems to us wholly immaterial whether we view the private or office car, occupied by a pass holder who is an officer or employee of the owning road, as an article of commerce when moving over the line of a non-owning carrier, or as a transportation facility of the moving carrier. If it is an article of commerce, it is being transported free for the benefit of the pass holder; if it is a

transportation facility of the moving carrier, it is being furnished free to the pass holder. In either event he enjoys [fol. 111] the service thus afforded as a privilege granted by his pass, and the service and the facilities thus afforded him so far exceed those furnished ordinary paying passengers as to bring the practice clearly within the jurisdiction of the Interstate Commerce Commission.

We are not impressed with the argument of the plaintiff that inasmuch as there can be no discrimination or preference under the Act except between persons or articles of the same class, preferential treatment of the pass holder can not constitute a violation of the Act. Pass holders and paying passengers are of the same general class—they are all passengers. It costs no more to transport one than the other. The pass holder is lifted out of the provisions of the Act only to the extent that he does not have to pay the usual and ordinary transportation charges exacted of other passengers. In every other respect he is on the same footing as other passengers, and if the facilities afforded him are found by the Commission, upon substantial evidence, to amount to an unjust discrimination or an undue or unreasonable preference, the Commission has the power under the Act to deal with the matter without interference from the courts.

The plaintiffs suggest that such a construction of the Act would prohibit common carriers from furnishing their officers and employees and the officers and employees of exchanging roads with passes carrying ordinary Pullman accommodations, which practice has always had the sanction of the Commission. It must be remembered, however, that the Act does not denounce every preference or discrimination. What is prohibited is unjust discrimination and unreasonable and undue preferences. We can very well understand how the Commission may consider that the granting of Pullman privileges to a pass holder is not an [fol. 112] unjust discrimination against paying passengers nor an unreasonable preference in favor of the pass holder, and yet hold that to furnish the pass holder with a private car is an unjust disrimination and an undue preference.

Being of the opinion that the Act is clear and unambiguous, the plea of contemporaneous construction and the adoption of that construction by Congress, of course must be rejected. United States v. Missouri Pacific R. R. Co., 278 U. S. 269.

For the reasons stated, we conclude that the practice condemned by the Commission is a matter within its jurisdiction, and, being supported by substantial evidence, we are without power to interfere. Chicago, R. I. & P. Ry. Co., v. United States, 274 U. S. 29; Virginian Ry. Co. v. United States, 278 U. S. 658.

We are not to be understood by what has been here said as holding that the Act confers upon the Commission the power to prohibit a common carrier from hauling its own officers and employees free over its own lines in a private car when they are engaged in the duties of their employment.

A decree conforming to the views herein expressed may be prepared and presented for entry.

Chas. H. Moorman, Smith Hickenlooper, Chas. I. Dawson.

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[fol. 113] IN UNITED STATES DISTRICT COURT

DECREE—June 13, 1930

This cause having been submitted for final decree upon the pleadings, evidence and exhibits, and the court, after argument of counsel, having fully considered same, for the reasons stated in the written opinion filed herein on May 28, 1930, is of opinion that the plaintiffs are not entitled to the relief sought, and it is therefore considered, ordered and decreed that plaintiffs take nothing by their petition and that same be dismissed, and that the defendants recover of the plaintiffs their costs herein expended; to all of which the plaintiffs except.

Chas. H. Moorman, Smith Hickenlooper, Cir. Judge; Chas. I. Dawson, Dist. Judge.

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[fol. 114] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 12, 1930

To the United States of America, Interstate Commerce Commission and Hon. J. W. Cammack, Attorney General of the State of Kentucky:

You, and each of you, are hereby notified that the Louisville & Nashville Railroad Company, Illinois Central Rail-

road Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, who sue, etc., Petitioners and Appellants in the above entitled cause, do hereby, on this 12th day of July, 1930, appeal to the Supreme Court of the United States from the decree signed, filed and entered in the above entitled cause on the 13th day of June, 1930, being that certain suit entitled No. 571, wherein petitioners above named are Petitioners and Appellants, and the United States of America and Interstate Commerce Commission are Defendants and Appellees.

The Attorney General of the State of Kentucky is included in this notice pursuant to provision of the District Court Jurisdiction Act of October 22, 1913.

Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for said Petitioners and Appellants.

Service of this notice is acknowledged this July 21st, 1930.

United States of America, by Elmer B. Collins (R), Special Assistant to the Attorney General; Interstate Commerce Commission, by Daniel W. Knowlton, Its Solicitor.

Dated July 12, 1930.

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[fol. 115] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 12, 1930

To the United States of America, Interstate Commerce Commission, and Hon. J. W. Cammack, Attorney General of the State of Kentucky:

You, and each of you, are hereby notified that the Louisville & Nashville Railroad Company, Illinois Central Rail-

road Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, who sue, etc., Petitioners and Appellants in the above entitled cause, do hereby, on this 12th day of July, 1930, appeal to the Supreme Court of the United States from the decree signed, filed and entered in the above entitled cause on the 13th day of June, 1930, being that certain suit entitled No. 571, wherein petitioners above named are Petitioners and Appellants, and the United States of America and Interstate Commerce Commission are Defendants and Appellees.

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Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for said Petitioners and Appellants.

Service of this notice is acknowledged this July 26, 1930.

J. W. Cammack, Attorney General of Kentucky, by M. B. Holefield, Asst. Atty. General.

Dated July 12, 1930.

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[fol. 116] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 12, 1930

The above named petitioners, and each of them, being aggrieved by the final order or decree of the above entitled Court heretofore made and entered on the 13th day of June, 1930, do hereby appeal from said decree to the Supreme Court of the United States of America, for the reasons specified in the assignment of errors filed herewith; and they pray that their appeal may be allowed, and that cita-

tion be issued as provided by law and that a transcript of the records, proceedings and documents upon which such decree was based, duly authenticated, be transferred to the Supreme Court of the United States under the rules of said Court in such case made and provided.

Your petitioners further pray that proper order be made relating to the security to be required of them.

Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for said Petitioners and Appellants.

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[fol. 117] In United States District Court

Assignment of Errors—Filed July 12, 1930

Come now the petitioners above named and present, with their petition for appeal herein, this assignment of errors and say that in the record and proceedings in the above entitled cause and the decree made and entered against them therein on the 13th day of June, 1930, there is error in the particulars hereinafter set forth, that is to say:

The District Court for the Western District of Kentucky erred in making the decree and in dismissing the petition herein in the following respects:

I

It erred in finding that the Commission had held in its report in this case that there was unjust discrimination or undue or reasonable preference as between the holder of a pass and a passenger paying for his ticket, and in further holding that this finding was supported by substantial evidence before the Commission, whereas the Commission made no such finding and there is no evidence whatever in the record to support it.

II

It erred in holding that a passenger using and lawfully entitled to use free transportation is, in law, in the same class as a passenger paying for his transportation, since the Interstate Commerce Act on its face clearly shows they do not belong to the same class and permits them to be treated and carried differently and places no limitati-n on the manner or means by which they may respectively be carried, beyond providing that pay passengers must be carried in [fol. 118] accordance with published tariffs. The Court accordingly erred in disregarding or misconstruing these provisions of the Act.

III

It erred in its interpretation of the law by holding that it was unlawful for a carrier subject to the Interstate Commerce Act to carry persons lawfully entitled to hold and holding free transportation in any vehicle selected by the carrier and used for the purpose, and by holding that the only method in which it was lawful for such a carrier to carry persons lawfully entitled to use and using free transportation was in the ordinary way and with the usual conveniences afforded the paying public.

IV

It erred in that it failed to hold, as it should have done, that the transportation or movement of a private railroad passenger car (commonly known, and hereinafter spoken of, as a railroad office car) of one carrier subject to the Interstate Commerce Act by another such carrier free, when occupied by a person using and lawfully entitled to use free transportation, is not contrary to the provisions of the Interstate Commerce Act.

V

It erred in failing to hold, as it should have done, that it is lawful and is not contrary to sections 6 or 22 of the Interstate Commerce Act, which relate to the shipment of property, for one railroad company subject to the Interstate Commerce Act to transport or move a railroad office car for another such railroad company free or at other than pub-

lished tariff rates when the car is occupied by a person or [fol. 119] persons using and lawfully entitled to use free transportation.

VI

It erred in failing to hold, as it should have done, that it is not unjustly discriminatory or unduly preferential or prejudicial for one carrier subject to the Interstate Commerce Act to haul the railroad office car of another such carrier free, or at less than published rates, when occupied by persons using and lawfully entitled to use free transportation, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars.

VII

It erred in failing to hold, as it should have done, that in the transportation or movement of a railroad office car of one carrier subject to the Interstate Commerce Act by another such carrier, when such car is occupied and is used as a means of transporting persons using and lawfully entitled to use free transportation, the carrying line is using such car as its own facility of furnishing transportation which it may legitimately move without charge.

VIII

It erred in holding that the Commission had lawful authority to make and issue its regulations of July 30, 1929, and its order of November 4, 1929, in so far as said order prohibited the movement free and without charge by one carrier subject to the Interstate Commerce Act of the office car of another such carrier when occupied by persons using and lawfully entitled to use free transportation.

[fol. 120] IX

The Court erred in failing to set aside and enjoin, as it should have done, said regulation of July 30, 1929, and the order of the Commission of November 4, 1929, in so far as said order declared illegal, and directed the carriers to cease and desist from, the movement of the office cars of other carriers subject to the Act free when such cars were occupied by, and used as the means of furnishing transportation to, persons using and lawfully entitled to use free transportation.

Wherefore the petitioners above named, appellants, pray that the said decree entered herein on the 13th day of June, 1930, be reversed and that the said District Court of the United States for the Western District of Kentucky be ordered to enter a decree, with direction that the said petition of the petitioners be granted and that said order of the Interstate Commerce Commission, in so far as it is complained of in said petition, be declared void and perpetually set aside, suspended and annulled and that your petitioners, appellants, may have such other and further relief as may be appropriate.

Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company; by Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for said Petitioners and Appellants.

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[fol. 121] EXHIBIT

Conference Ruling 95, from Conference Rulings Bulletin No. 7 of the Interstate Commerce Commission, Issued August 1, 1917, by Order of the Commission; Introduced in Evidence in This Case

[fol. 122] 95. Notice as to the issuance of passes.—It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

(a) Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the in-

dictment and prosecution of all carriers and persons issuing passes to or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1. Officers or employees of news companies other than newsboys. (See Transportation of Newspaper Employees, 12 I. C. C., 15.)

2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair, or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad. (The amendatory act of June 18, 1910, brings telephone and telegraph companies within the jurisdiction of the Commission; see ruling 305; see also rulings 161 and 219.)

3. Officers or employees of surety, transfer, and baggage companies, except baggage agents. (See ruling 216, also U. S. v. Erie R. R., 236 U. S. 259.)

4. Officers or employees of carriers not subject to the act to regulate commerce, including officers and agents of steamship and stage lines not subject thereto. (See ruling 196; also 95c and 475.)

5. Officers or employees of subsidiary corporations engaged in business other than transportation subject to the act to regulate commerce, save that such officers and employees may be granted free transportation when attending to business imposed upon a carrier subject to the act. (See rulings 169, 208, and 263.)

6. Families of local attorneys, surgeons, and others who are not regularly employed by carriers. (See ruling 208a.)

(b) Each pass issued must bear upon its face the name of some person belonging to a class named in section 1 of the act as eligible to receive free transportation. In addition to such person so named a pass may also carry not to exceed a specified number of unnamed persons of any

[fol. 123] class eligible to receive free transportation; the number and the class to which such person belongs being specified upon the face of the pass—that is to say, passes in the following forms will be recognized by the Commission as legal:

"Pass John Smith, President, car, and five officers and employees of the X. Y. & Z. Railway."

"Pass J. R. Barner and six linemen, foreman, and force of the Western Union Telegraph Company. Good only when traveling in connection with the construction, maintenance, or operation of the lines of the Western Union Telegraph Company on the right of way of this A. B. C. Railway Company."

"Pass one extra messenger of the Southern Express Company when presented with letter signed by Superintendent, Assistant Superintendent, or Route Agent of said Express Company, authorizing use and giving name of person to be passed."

"Pass John Smith, section foreman, and six employees of X. Y. & Z. Railway."

(c) The Commission holds that the word "family," as used in section 1 of the act to regulate commerce, includes those who are members of, and who habitually reside in, the household of the person eligible to receive family passes, including household servants when traveling with the family or with any member thereof, and relatives who are in fact dependent upon such persons, although not actually residing in his household. (See rulings 92, 174, and 417.) The Commission will, therefore, view passes in the following form as lawful:

"Pass John Smith, wife, two sons, three daughters, and two servants."

"Pass Mrs. John Smith and daughter, account John Smith, Agent X. Y. & Z. Railroad Company at Washington, D. C."

(d) The name of the person presenting the pass must appear upon it. Passes intended to be used in the absence of the head of the family whose occupation makes the issuance of passes lawful must, in addition to the name of

said head, show the name of the person using the same. (See ruling 290.) For instance, a pass to be used by John Smith, his wife, or his daughter, separately, should read:

"Pass John Smith, Mrs. John Smith, and Miss Mary Smith, account C. & O. Agent at Richmond, Va."

(e) Every pass to an officer or employee of a carrier other than the one issuing the pass, shall indicate the name and rank of the person to, or on behalf of whom, such pass is issued, as well as the name of the carrier employing him.

(f) The Commission construes the act, so far as it relates to railway-mail service employees, as giving such employees the right to receive free transportation when on duty in their cars, or when traveling under orders from a superior [fol. 124] officer. The Commission does not now undertake to say how far this portion of the act to regulate commerce is modified or controlled as regards railway-mail service employees by other statutes or by contracts between carriers and the Post Office Department. (See ruling 377.)

(g) The Commission will recognize any rail or water carrier filing a tariff, joint or local, with the Commission, as a carrier subject to the act so far as the issuance of passes to its officers and employees may be concerned. Where a carrier has no tariffs on file with the Commission, and does not acknowledge itself subject to the Commission's jurisdiction, the Commission will regard the issuance of passes to its officers or employees as unlawful, without, however, thereby passing upon the question of the jurisdiction of the act over such carrier in so far as it may be necessary to assert such jurisdiction. In this regard reference is made to Cosmopolitan Shipping Co. v. Hamburg American Packet Co., 13 I. C. C., 266, and In re Petition Frank Parmelee Co., 12 I. C. C., 39. By reference to these decisions it will be seen that among the carriers not subject to the act are ocean carriers to nonadjacent foreign countries and domestic carriers by wagon, stage, or automobile. Carriers covered by these decisions are not eligible to file tariffs or receive passes. (See rulings 196, 216, 263, 355, and 475.)

(h) The Commission reaffirms Rule 63 of Tariff Circular 15-A, now reported as ruling 208 of this Bulletin.

(i) The Commission can not undertake, in any case, to determine whether or not individuals are within any of the classes mentioned in section 1 of the act as eligible to receive free transportation.

(j) The Commission will not regard as unlawful allowance of use, or the use of passes merely irregular in form, under this ruling, during the present calendar year. Passes, however, issued to persons not eligible to receive the same must be called in at once, as well as passes so loosely framed that persons not eligible to receive free transportation may be carried upon them—that is to say, a pass to "John Smith, family, and household servants," although irregular in form, will not be regarded by the Commission as unlawful prior to January 1, 1909. A pass, however, to "John Smith, car, and party," being susceptible of use for the transportation of persons not within the act, should be immediately corrected.

(k) Carriers are enjoined against the destruction of records or memoranda touching the issuance of passes, and the passes themselves, coming into the hands of the carriers after use, must, until further orders of the Commission, be retained for a period of not less than five years. (See Commission's Regulations to Govern Destruction of Records of Steam Roads Effective July 1, 1914, and Regulations to Govern Forms and Recording Passes, Effective Jan. 1, 1917.) October 12, 1908.

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[fol. 125] IN UNITED STATES DISTRICT COURT

**Statement of the Evidence, Condensed as Required by Equity Rule 75, Presented to the District Court in This Case.**—Filed July 12, 1930

On the trial of this case in the District Court the following evidence was introduced.

1. The Commission's Conference Ruling No. 95, which is as follows: See Page 113

[fols. 126-129] 2. The Pass Regulations of the Commission issued in 1917 and in force at the time of the report of the Commission in this case, a copy of which is filed as an exhibit to the answer of the Commission herein and is to be copied in the record.

3. The report of the Commission in the Tap Line Case, 23 I. C. C., 277-298.

4. The report of the Commission in the Colorado Free Pass Investigation, 26 I. C. C. 491-494.

5. The report of the Commission in the Five Per cent Case, 31 I. C. C. 351-410.

6. Pages 6796 and 6797 of Senate Document No. 466, 63d Congress, 2d Session, taken from the Senate print of the Commission's record in the Five Per Cent Case, which pages are as follows:

[fol. 130]

EXHIBIT

Pages 6796 and 6797 of Senate Document No. 466, 63d Congress, 2d Session; Part of Record, in Five Per Cent Case, 31 I. C. C. 410; Introduced in Evidence in This Case

[fol. 130a] Summary of Carriers' Answers to Question No. 71 Contained in the Commission's Circular of Inquiry Dated December 20, 1913

Question No. 71.—Give on Form No. 43, as required by headings and instructions thereon, information regarding service performed by the respondent in handling over its lines private cars for other than its own officials and employees during the year ended June 30, 1913.

Form No. 43.

Answer to Question No. 71.

[Name of respondent.]

Statement showing the private cars moved over the lines of the respondent during the year ended June 30, 1913, on passes or other free authority issued to other than respondent's officials and employees, the approximate expense of handling such cars, and the revenue that would have accrued to respondent if cars had been moved at tariff rates.

| Date of movement | Car | | Description of pass on which the car moved | | | | | | Points between which moved | | Approximate cost of handling | Revenues at tariff rate | Remarks |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Initials | Number | Kind of pass | Number | In favor of— | Address | Issued account of— | | From— | To— | | | |
| | | | | | | | Official title | Name of carrier | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) | (i) | (j) | (k) | (l) | (m) | (n) |
| | | | | | | | | | | Total | | | |

Instructions.—The returns on this form should show all private cars handled free over the lines of the respondent, during the period named, for other than respondent's own officials and employees.

In columns (d) to (i), inclusive, should be given a description of the pass covering the movements of each car. Column (d) should show kind of pass, as "Annual," "Term," "Trip," or "Telegraph." If car moved under free authority other than a pass, these six columns should be left blank and a short description of such authority, to whom issued and reasons therefor, should be given in "Remarks" column.

In columns (j) and (k) should be given the names of the stations between which car was moved on respondent's lines.

Column (l) should show the approximate cost to the respondent of moving the car over its rails, and a brief statement, explanatory of the basis used in arriving at this cost should be made a part of the answer hereto.

Column (m) should show the revenue that would have accrued to respondent if car had been moved at tariff rates.

[fol. 130b] Statement showing the private cars moved over the lines of the respondent during the year ended June 30, 1913, on passes or other free authority issued to other than respondent's officials and employees, the approximate expense of handling such cars, and the revenue that would have accrued to respondent if cars had been moved at tariff rates.

| Name of carrier | Car movements | Revenue at tariff rate | Remarks |
|---|---|---|---|
| Ann Arbor R. R. Co. | 19 | $1,724.50 | |
| Atl. & St. Lawrence R. R. Co. | 7 | 525.00 | |
| Atlantic City R. R. Co. | 6 | 102.50 | |
| Baltimore & Ohio R. R. Co. | 386 | 51,107.30 | |
| Balt., Ches. & Atl. Ry. Co. | 2 | 142.00 | |
| Boston & Maine R. R. | 365 | 19,440.50 | |
| Buff. & Sus. Ry. Co. | 4 | 144.00 | |
| Buff., Roch. & Pitts. Ry. Co. | 73 | 8,374.75 | |
| Central New England Ry. Co. | 20 | 446.50 | Respondent reports 7 additional movements deadhead, without revenue. |
| Central R. R. Co. of New Jersey | 420 | 7,478.60 | Respondent reports 53 additional movements deadhead, without revenue. |
| Central Vermont Ry. Co. | 82 | 4,175.75 | |
| Chesapeake & Ohio Ry. Co. (includes also C. & O. Ry. Co. of Indiana) | 216 | 37,162.20 | Respondent reports 1 additional movement deadhead, without revenue. |
| Chicago & Alton R. R. Co. | 109 | 11,217.24 | |
| Chi. & East'n Ill. R. R. Co. (includes also E. & T. H. R. R. Co.) | 122 | 11,501.38 | |
| C., H. & D. Ry. Co. | 26 | 2,069.50 | |
| Chi., Ind'lis & Sou. R. R. Co. | 8 | 371.00 | |
| Chi., Ind. & Louisv. Ry. Co. | 80 | 7,345.00 | |
| C., C., C. & St. L. Ry. Co. | 248 | 35,064.75 | |
| Cumberland Valley R. R. Co. | 103 | 3,685.40 | |
| Dayton & Union R. R. Co. | 1 | 5.64 | |
| Delaware & Hudson Co. | 90 | 7,446.00 | Respondent reports 6 additional movements deadhead, without revenue. |
| Del., Lack. & W. R. R. Co. | 54 | 1,032.84 | |
| Detroit & Mackinac Ry. Co. | 30 | 1,162.98 | |
| Det., Tol. & Ironton Ry. Co. | 4 | 8.40 | |
| Erie R. R. Co. (includes also Chi. & Erie R. R. Co.) | 156 | 27,130.10 | |
| Grand Rapids & Ind. Ry. Co | 72 | 7,264.75 | |
| Grand Trunk Western Ry. Co. | 58 | 8,373.75 | |
| Hocking Valley Ry. Co. | 30 | 1,598.75 | |
| Kanawha & Michigan Ry. Co. | 1 | 18.00 | |

**Statement—Continued**

| Name of carrier | Car movements | Revenue of tariff rate | Remarks |
|---|---|---|---|
| L. E. & W. R. R. Co. (includes also F. W., Cin. & L. R. R. Co. and Nor. Ohio Ry. Co.) | 4 | 130.00 | |
| L. S. & M. S. Ry. Co. | 331 | 45,542.20 | |
| Lehigh & Hudson River Ry. Co. | 17 | 670.14 | |
| Lehigh & New Engl. R. R. Co. | 3 | 118.00 | |
| Lehigh Valley R. R. Co. | 195 | 9,126.25 | |
| Long Island R. R. Co. | 10 | 283.50 | |
| Maine Central R. R. Co. | 50 | 1,006.00 | |
| Michigan Central R. R. Co. | 280 | 27,290.50 | |
| N. Y. C. & H. R. R. Co. (includes also B. & A. R. R. Co.) | 540 | 65,054.97 | |
| N. Y., C. & St. L. R. R. Co. | 13 | 1,500.00 | |
| N. Y., N. H. & H. R. R. Co. | 161 | 15,633.25 | Respondent reports 34 additional movements deadhead, without revenue. |
| N. Y., Phil. & Nor. R. R. Co. | 26 | 924.13 | |
| N. Y., Sus. & W. R. R. Co. | 2 | 47.80 | |
| Norfolk & Western Ry. Co. | 240 | 22,641.00 | |
| Pennsylvania Co. | 71 | 9,861.25 | |
| Pennsylvania R. R. Co. (includes also Northern Central R. R. Co., New York Bay R. R. Co., Phil., Balto. & Wash. R. R. Co., Rosslyn Connecting R. R. Co., Union R. R. Co. of Balto., West Jersey & Seashore R. R. Co., Philadelphia & Beach Haven R. R. Co.) | 1,059 | 96,128.03 | |
| Peoria & Eastern Ry. Co. | 11 | 623.75 | |
| Pere Marquette R. R. Co. | 108 | 4,610.25 | |
| Philadelphia & Reading Ry. Co. | 501 | 16,229.73 | Respondent reports 73 additional movements deadhead, without revenue. |
| Pittsburg & Lake Erie R. R. Co. | 60 | 2,929.50 | |
| Pitts., C. C. & St. L. Ry. Co. | 129 | 17,118.75 | |
| Port Reading R. R. Co. | 1 | 38.00 | |
| Rutland R. R. Co. | 38 | 2,386.50 | |
| Toledo & Ohio Central Ry. Co. | 59 | 2,031.25 | |
| Ulster & Delaware R. R. Co. | 12 | 345.36 | |
| Vandalia R. R. Co. | 100 | 9,193.50 | |
| Wa. Pitts. Ter. Ry. Co. (includes also West Side Belt R. R. Co.) | 18 | 653.00 | |
| Wabash R. R. Co. | 200 | 29,989.60 | |
| Western Maryland Ry. Co. | 50 | 2,938.50 | |
| Total | 7,081 | 644,250.79 | |

Note—The approximate cost of handling private cars, as called for in column (1) of Form No. 43, was given by but few carriers. Returns as a whole are so incomplete as to be of no value.

[fol. 131] 7. A duly certified copy of the entire record of the Interstate Commerce Commission in No. 17757—In the Matter of the Use of Private Passenger Train Cars—in which the order complained of in the petition was entered.

No evidence was given by witnesses, either orally or by deposition. The case was tried on the facts detailed in the report of the Interstate Commerce Commission (155 I. C. C. 775) as to what the practices of the carriers were. These facts, so detailed, the petitioners did not controvert, but they contended that, assuming them to be true, the Commission did not have lawful authority to enter so much of its order based thereon as prohibits one railroad company subject to the Interstate Commerce Act to move, without making a charge therefor, the private passenger or business car of another such railroad company when occupied by persons using and lawfully entitled to use free transportation.

The circumstances relating to the filing of the full duly certified copy of the record before the Commission were these: Subsequent to the oral argument and to the filing of briefs on both sides, the parties agreed to the reopening of the case for the purpose of allowing petitioners to file such duly certified copy of the entire record of the Interstate Commerce Commission in the above described proceedings, and this was accordingly done.

As appears from the correspondence, it was presented to the Court to meet a point made in one of the briefs for the defendants that, in the absence of such record, the Court shall make certain conclusive presumptions as to what it contained. The order of submission was accordingly set aside, said record was filed, the case was immediately resubmitted, the argument of the defendants' counsel based upon its absence was withdrawn, and the case was in due time decided.

From this record it appears that a questionnaire was sent by the Commission to all Class I and Class II carriers and switching and terminal carriers, calling for information as to private passenger trains owned, leased, or operated, the movement or use of such cars as were trans-[fol. 132] ported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on the re-

spective trips. Returns or answers thereto were filed under oath by 387 carriers covering the calendar years 1923, 1924 and 1925.

The only evidence appearing in the record before the Commission was the returns or answers of the various carriers to this questionnaire. These answers covered many thousands of pages of statistical data, differing in details but being practically the same in substance. These returns or answers were correctly tabulated by the Commission, its tabulation being shown in Appendices A, B, C, D, E, F, G and H attached to the Commission's report in this case. The returns or answers sustained the statements of fact made and detailed in the Commission's report and in its appendices as to what the practice of the carriers were. An official pamphlet copy of this report and the appendices was made a part of the petition, marked "Exhibit B in full", and, inasmuch as it was not printed in full with the petition, a copy of it is hereto attached as a part hereof. The returns and answers further showed that the illustrations of the different phases of the practice of transporting private passenger cars, including so-called office cars, shown by the particular instances set forth in the text of the report and in Appendices C, D, E, F, G and H, were illustrative and typical of the practices of the carriers named in the Commission's order. The facts so stated and detailed in the Commission's report and its appendices (such particular instances being so regarded as illustrative and typical) constitute a full and complete statement, in simple and condensed form, of all evidence or facts which were contained in the record before the Commission on which it entered the order complained of in this case.

8. As appears from the order of the Commission herein, which is hereby made a part of this statement of evidence, [fol. 133] the defendant carriers waived any further or additional hearing before the Commission to that which had been given prior to said order.

9. No part of the evidence, except as above stated and herein condensed, contained in the record of the proceedings before the Interstate Commerce Commission, or of this case before the District Court, is pertinent, material or essential to the decision of any question presented on

this appeal, and accordingly, pursuant to the provisions of Equity Rule 75, all of it except what is herein contained is omitted.

Edward S. Jouett, R. V. Flecther, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for Petitioners and Appellants.

Endorsement on back:

Notice of lodgment of the within Statement of Evidence in the Clerk's office of said Court is hereby acknowledged, this eighth day of July, 1930.

Elmer B. Collins, Special Assistant to the Attorney General; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission.

# INTERSTATE COMMERCE COMMISSION

## No. 17757

## IN THE MATTER OF USE OF PRIVATE PASSENGER TRAIN CARS

*Submitted March 14, 1929. Decided June 21, 1929*

1. The transportation or movement of private passenger cars, including so-called office cars, by one carrier for another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act.
2. It is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenue for the movement of privately owned or chartered cars.
3. The transportation of persons in private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial.

*Thomas P. Healy* for Interstate Commerce Commission.

*Alfred P. Thom, Alfred P. Thom, jr.*, and *R. H. Aishton* for Association of Railway Executives.

*W. H. Lyford* for Chicago & Eastern Illinois Railroad Company.

### REPORT OF THE COMMISSION

McMANAMY, *Commissioner:*

Exceptions to the proposed report were filed on behalf of the Association of Railway Executives and the Chicago & Eastern Illinois Railroad Company and oral argument has been had.

This is an investigation instituted on our own motion into and concerning the use of private passenger-train cars, including so-called office cars, in the transportation of persons, with a view to making such order or orders in the premises as may be warranted.

A questionnaire was sent to all Class I and II carriers and to switching and terminal carriers, calling for information as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The returns to the questionnaire were so voluminous and the subject matter so diversified that a complete detailed analysis thereof is

impracticable within the limits of this report. Different phases of the subject have been considered generally and particular practices and instances cited as illustrations.

The returns show that a substantial portion of the total mileage of private passenger-train cars, including so-called office cars, herein referred to collectively as private cars, was on the lines of carriers other than those owning the cars. The private cars thus moved over foreign lines were transported without charge. In other words, a pass was issued covering transportation of the private cars similar to that issued for the transportation of certain classes of persons as provided for in sections 1 and 22 of the act.

A general summary of the data included in the returns to the questionnaire is contained in Appendix A, which shows separately for Class I roads, Class II roads, and for switching and terminal roads the number of private passenger cars owned or leased, number of trips, number of occupants holding passes, and the number holding tickets. In Appendix B is contained a statement, by roads, of the mileage of private passenger cars during the years 1923, 1924, and 1925 on home and foreign lines, also of the mileage of foreign cars on home lines. The data submitted by carriers covering movement of foreign cars on home lines do not in some cases agree with the data submitted by the owning carrier covering mileage of cars on foreign lines. These discrepancies are, however, of little importance and no attempt was made toward correction thereof.

It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants. The facilities thus provided for those traveling in private cars exceed the facilities of the ordinary coach or Pullman car.

The returns to the questionnaire show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach. The following instances, which refer to movements of private cars of other carriers over the lines of the Atlantic Coast Line, Atchison, Topeka & Santa Fe,[1] New York Central, and Union Pacific, will illustrate the practices in these respects. The parties indicated were in charge of the cars.

[1] Hereinafter referred to as the Santa Fe.

| | Miles |
|---|---|
| On the Atlantic Coast Line: | |
| 1. Wife of director | 664 |
| 2. Wife of director | 1,327 |
| 3. Wife of chairman of board | 3,000 |
| 4. Wife of vice president | 54 |
| 5. Wife of president | 108 |
| 6. Wife of senior vice president | 340 |
| 7. Wife of vice president | 651 |
| 8. Wife of vice president | 389 |
| 9. Wife of vice president | 108 |
| 10. Wife of chairman of board | 274 |
| 11. Widow of deceased president | 1,327 |
| 12. Daughter of chairman of board | 631 |
| 13. Wife of general superintendent | 155 |
| 14. Wife of vice president | 464 |
| On the Santa Fe: | |
| 1. Wife of president | 2,242 |
| Car deadhead, Los Angeles, Calif., to Chicago, Ill. | 2,227 |
| 2. Widow and son of deceased vice president | 2,242 |
| 3. Widow of deceased director | 1,129 |
| 4. Widow of deceased president | 2,006 |
| Car deadhead to Kansas City, Mo. | 1,791 |
| Car deadhead Chicago, Ill., to Los Angeles, Calif. | 2,260 |
| 5. Widow of deceased president | 2,260 |
| 6. Wife of president | 2,242 |
| Car deadhead, Los Angeles, Calif., to Chicago, Ill. | 2,242 |
| 7. Wife of vice president | 1,919 |
| Car deadhead, Los Angeles, Calif., to Kansas City, Mo. | 1,790 |
| 8. Widow of deceased director | 1,708 |
| 9. Widow of deceased president | 3,795 |
| Car deadhead, Los Angeles, Calif., to Kansas City, Mo. | |
| 10. Wife of chairman of board | 2,225 |
| On the New York Central: | |
| 1. Wife of president | 877 |
| 2. Wife of director | 876 |
| 3. Widow of deceased director | 438 |
| 4. Widow of deceased director (in privately owned car) | 1,314 |
| 5. Wife of vice president | 856 |
| 6. Wife of vice president | 597 |
| 7. Wife of chairman of board | 294 |
| 8. Wife of president | 667 |
| 9. Wife of director | 961 |
| On the Union Pacific: | |
| 1. Wife of director | 1,350 |
| 2. Wife of president | 2,522 |
| 3. Widow of deceased chairman of board (in privately owned car) | 1,980 |
| 4. Wife of vice president | 807 |
| 5. Widow of deceased vice president | 2,434 |
| 6. Wife of executive vice president | 1,980 |
| 7. Wife of chairman of board | 990 |

On December 9, 1925, Chicago, Rock Island & Pacific car No. 1911 left Chicago, Ill., for Los Angeles, Calif., and return. This car was occupied by the general freight agent of the carrier and by the vice

president of the Studebaker Corporation and wife, together with four children and a maid. The mileage of this trip totaled 4,594 miles. On November 8, 1925, the same car traveled from Chicago to Champaign, Ill., over the Illinois Central and was occupied by the system freight-traffic manager of the carrier, who traveled on a pass, and by 15 other persons holding tickets. The returns to the questionnaire show that "most of these parties were engaged in the coal business."

On May 15, 1925, Pittsburgh & Lake Erie car No. 99 moved over the Louisville & Nashville from Louisville, Ky., to Cincinnati, Ohio. The car was in charge of the assistant to the president, and accompanying him were the following guests using tickets:

Vice president and wife, Standard Steel Spring Company.
President and wife, Schoonover Furnace Company.
Official and wife, Severance Manufacturing Company.

There is also a substantial use of private cars, both on home and foreign lines, by directors of carriers. For example, Appendix C shows movements of private cars occupied by directors of the Pennsylvania Railroad. Trips of less than 200 miles on foreign lines are not included nor are trips between Pennsylvania Railroad points such as Chicago and St. Louis, Mo., via the Chicago & Alton included.

Attention is called to the record of movements of private cars occupied by or assigned to a vice president of one of the eastern carriers, which is shown in Appendix D. The same official is an executive of several other carriers in different parts of the country.

During the three-year period the eight private cars of the New York, Chicago & St. Louis[1] traveled 254,814 miles on foreign lines, while foreign-line cars traveled only 26,693 miles on that line. An analysis of the movements of these eight cars on trips involving both home and foreign lines is contained in Appendix E. These trips included trips to Florida, California, Michigan, Maine, French Lick Springs, Ind., Hot Springs, Ark., and White Sulphur Springs, W. Va. Included among the occupants in numerous instances were the wives of officials and in other instances the parties included guests holding tickets.

The movement of private cars to resorts commonly patronized by those seeking recreation or amusement, and located on foreign lines, is very noticeable. For example, the total mileage of private cars of other carriers over the Atlantic Coast Line leading to Florida during the three-year period was 436,681, and over the Richmond, Fredericksburg & Potomac was 227,312. In considering this figure it is to be borne in mind that the latter line is only 116 miles in length. The return of the Maine Central shows that the mileage of foreign private cars over that line was 41,321, which is almost twice the mileage of

[1] Hereinafter referred to as the Nickel Plate.

Maine Central private cars on its own line. During the same period private cars of the Maine Central were moved only 2,028 miles over other lines.

There is also an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. The mileage of private cars used by the latter lines is largely on foreign lines, and in numerous instances the home stations of the cars and the movements thereof are so far removed from the vicinity of the owning road that it is difficult to conceive the circumstances under which such movements could have been in the interest of or connected with the operation of the road owning the car. For example, the private cars of the Interstate Railroad made 4,296 miles on home lines and 21,544 miles on foreign lines; the cars of the Louisiana & Pacific made 167 miles on home lines and 61,046 miles on foreign lines, including travel for the account of the Longview, Portland & Northern; the cars of the Midland Terminal made 113 miles on home lines and 19,027 miles on foreign lines; the cars of the Minneapolis, Northfield & Southern made 160 miles on home lines and 15,058 miles on foreign lines; and the cars of Piedmont & Northern made 2,000 miles on home lines and 73,888 miles on foreign lines.

As a further illustration, attention is called to the situation disclosed with respect to the Louisiana & Pacific. This was one of three sawmill roads which composed the so-called Shreveport, Alexandria & Southwestern system, 91 miles in extent. The roads were owned and operated as subsidiary companies by the Long Bell Lumber Corporation, which has mills and plants in various sections of the country. According to Poor's and Moody's Manuals the following Long Bell Corporation officials are also officers of the subsidiary railways: Chairman, president, two vice presidents, and the secretary and comptroller. The carriers' replies to questions 2 and 3 of the questionnaire are reproduced in order to show clearly the cars and assignments:

Question 2. Statement of business, official, or other private passenger-train cars owned or leased and transported free or at less than published tariff rates during the years 1923, 1924, and 1925.

| Car | | |
|---|---|---|
| Initial | Number or name | If assigned, to whom |
| L & P Ry Co | Kansas | Assigned. These cars were owned by Louisiana & Pacific Railway Company which, with the Sibley, Lake Bisteneau & Southern Railway Company and the Woodworth & Louisiana Central Railway Company comprise the "Shreveport, Alexandria & Southwestern Railway System." The cars were used jointly by general officers of these system lines and also by general officers of the Mississippi Eastern Ry. Co. and Longview, Portland & Northern Railway Company, some of whose officers and directors are also officers and directors of the "Shreveport, Alexandria & Southwestern Railway System" lines. |
| L & P Ry Co | [illegible] Permanent, Kansas and May 4, 1924 | |
| L & P Ry Co | [illegible] Assigned from L. P. & N. Ry. Co. July 15, 1924 | |

[illegible] C. C.

*Question 3.* Home cars on home railroad.

None. Headquarters of car located off line. Explanation: The business car of these lines is held at Kansas City, Mo., at which point are locate l the general offices of respondent.

These cars with home station at Kansas City, Mo., the headquarters of the Long Bell Corporation, made 167 miles on home lines and 61,046 miles on foreign lines, while these roads were used for a total of 60 miles by private cars of foreign lines. Most of the trips were made between Kansas City and Longview, Wash. There were several so-called inspection tours which embraced Mississippi, Louisiana, and Texas destinations. The home-line mileage on these trips ranged from 5 to 88 miles and the foreign-line mileage ranged from 2,500 to 2,559 miles. A list of ticket passengers on the trips of this system's cars, together with the advantages accruing to the families of the officials, indicates the real purpose of the cars. Included among the ticket passengers are the following Long Bell Lumber Corporation officials and employees:

Vice president.
Secretary to vice president.
Assistant to vice president.
General manager of Longview farm and wife.
Sales manager of sash and door department.
Manager of mercantile department.
Mill manager.
Second secretary to vice president.
Superintendent of construction.
Third secretary to vice president.
Clerk in mercantile department.
Treasurer and wife.
Architect.
Landscape architect.
Advertising manager.
Chief clerk.
Mill superintendent.

The returns show 65 passages on passes and 55 on tickets. Various members of the families of officials, including maids and valets, comprise a large portion of the travelers on both pass and ticket transportation. A statement of the movements of Louisiana & Pacific private cars on the Union Pacific was taken from the latter's return and is included as Appendix F.

The returns with respect to the Nevada Northern also illustrate how a small road with several private cars and with important non-carrier interests makes use of the private car. This road according to Poor's and Moody's Manuals operates 165 miles of broad-gage line in Nevada. The road is owned by the Nevada Consolidated Copper Company, which is controlled by the Utah Copper Company, which in turn is controlled by the Kennecott Copper Corporation. The same interests own or control the Copper River & Northwestern Railway in Alaska. Officers and directors of the Nevada Northern are officers or directors in one or more of the related corporations, namely: Copper River & Northwestern Railway, Nevada Consolidated Copper Company, Utah Copper Company, and Kennecott Copper Corpora-

tion. The return of the Nevada Northern shows that the road owns two private cars; one, the N. N. 101, has headquarters on the line at East Ely, Nev., while the other car, N. N. 100, is identified in the returns as follows: "Note: Home station of Nevada Northern 100 is Jersey City, N. J. (Erie Railroad)." This car was used extensively by the president of the Nevada Northern and by the president and vice president of the Copper River & Northwestern. A third car, which was moved extensively on the account of the Nevada Northern, is the car "Cyprus," which, according to the return, is owned by a vice president of that railway. The extent of the travel of cars charged to the Nevada Northern on the Western Pacific, Southern Pacific, and Union Pacific is shown in Appendix G.

The return shows that in most instances the owner of the "Cyprus" traveled as vice president of the Nevada Northern, but at other times he traveled as an official of the Bingham & Garfield. The return of the Ray & Gila Valley in referring to movements of the same official's car, "Cyprus," stated: "We have kept no record of the movements of * * * car on own line and were, therefore, delayed since receipt of your second request in searching out the dates of his semi-annual visits to the property in Arizona." This return also showed with respect to occupation that the official referred to "is the president and active executive in charge of operations of the Jackling-Hayden-Stone group of copper mines and subsidiary railways."

The returns show that a substantial portion of the total mileage of private cars, especially on foreign lines, was what is commonly referred to as "deadhead" mileage, that is, the cars were not occupied, except in some instances by an attendant. The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied. On the Baltimore & Ohio and the Michigan Central approximately 3 per cent of the total mileage of foreign private cars was deadhead. On the Cleveland, Cincinnati, Chicago & St. Louis the percentage was 4, on the Santa Fe it was 5, on the Boston & Maine over 9, on the New York Central over 11, on the Richmond, Fredericksburg & Potomac over 12, and on the Atlantic Coast Line over 16.

The returns show numerous instances where private cars were deadheaded to and from off-line shops without charge. Also worthy of consideration is the matter of free switching service and free storage for private cars. A large number of the private cars covered by the returns are held at off-line stations when not in use. Many are so held at New York and the returns indicate that the matter of storage and switching of these cars is of considerable importance from the standpoint of operating expenditures.

In numerous cases cars were rented from the Pullman Company by officers of carriers, and such cars were moved without charge by the carriers. The movements of Pullman private cars occupied by railway officials and others over the Union Pacific and New York Central are summarized in Appendix H.

Numerous instances are shown where private cars of the carriers were loaned to officers of other carriers. As an illustration, Missouri Pacific car No. 1 was loaned on May 15, 1925, to the chairman of the board of the Manufacturers Railway for a trip from St. Louis to Louisville. The returns show that this official used a pass and that he was accompanied by seven persons holding tickets. Union Pacific car 101 was used for a trip from New York to Colorado Springs, Colo., during July and August, 1923, and was occupied by the widow and daughter of a former director, holding passes, and by five other persons holding tickets.

Many private cars which were transported free, or at less than tariff rates, are of private ownership as distinguished from carrier ownership. For example, Union Pacific car No. 1900 is owned by the widow of a former chairman of the board of one of the western carriers. Attention is called to the movement of this car during the period from July 16 to September 5, 1923, as indicated below:

| | |
|---|---|
| July 16, 1923. Ogden, Utah, to Oakland Pier, Calif. | ..... |
| July 16, 1923. Oakland to San Francisco, Calif. | Deadhead |
| July 17, 1923. San Francisco to Santa Barbara, Calif. | ..... |
| July 30, 1923. Santa Barbara to Los Angeles, Calif. | Deadhead |
| July 31, 1923. Los Angeles to Santa Barbara, Calif. | Deadhead |
| Aug. 14, 1923. Santa Barbara to Los Angeles, Calif. | ..... |
| Aug. 15, 1923. Los Angeles to Santa Barbara, Calif. | ..... |
| Aug. 29, 1923. Santa Barbara to Los Angeles, Calif. | ..... |
| Aug. 29, 1923. Los Angeles to Santa Barbara, Calif. | Deadhead |
| Sept. 1, 1923. Santa Barbara to San Francisco, Calif. | ..... |
| Sept. 1, 1923. San Francisco to Oakland Pier, Calif. | Deadhead |
| Sept. 5, 1923. Oakland Pier, Calif., to Ogden, Utah. | ..... |

The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line and when used for that purpose are an important facility for carrying on the business of the road. It is seldom, however, that these duties necessitate a movement of the car over other lines. In some cases such a movement may be justified for business reasons; for example, where it avoids a very circuitous haul over the home line. But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These

and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of the private cars of other carriers. We will, therefore, proceed to a consideration of the law applicable to the subject.

A passenger-train car is property. The provisions of the interstate commerce act relating to free transportation of passengers and property are contained in sections 1 and 22. In *American Express Co.* v. *United States*, 212 U. S. 522, the Supreme Court considered the question of whether common carriers could lawfully issue any—

> frank or other documents for the free transportation of property to the following persons, to-wit: The officers, agents, attorneys, and employees of said defendant and their respective families; the officers and employees of other express companies and their respective families; the officers and employees of any railroad or any other common carrier subject to the act to regulate commerce and its amendments, and their respective families.

An injunction had been issued by the lower court restraining the issuance of such franks and from transporting or forwarding for the persons above named, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of the interstate commerce act and its amendments.

It was contended in that case that the custom of the express companies to issue such franks was one of long standing and presumably known to Congress; and that there was no record of any protest against it to or by this commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. On the other hand, it was contended for the United States that the only section of the interstate commerce act which relates to the carriage of property free or at reduced rates is section 22, and that there is nothing in it which by any possible construction can be taken as covering the granting or interchanging of franks, applying to the transportation of property by the express companies.

In disposing of the case and in affirming the decrees of the lower court the Supreme Court said:

> We are clearly of the opinion that, without doing violence to the language used in section one—including the proviso—its terms can not be held to include the transportation of goods.

The question was again presented in *Legality of Express Franks*, 50 I. C. C. 599, 603. There we said:

> The free carriage either of persons or of property is contrary to the general principles to be found in the act to regulate commerce, as amended. See sections 2, 3, and 6. The same principle is asserted even more strongly in the legislation accompanying the act itself and which was enacted in aid of its enforcement and for the punishment of those who offend its provisions. Any free carriage of passengers that is now lawful is authorized in the form of exceptions to the general

principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act. While the free carriage of certain of the excepted classes of passengers has thus been authorized even when traveling for pleasure or for their personal benefit, the spirit of the whole act forbids the free carriage of property except where public interests are involved under the conditions specified in section 22.

This decision was reaffirmed in *Legality of Express Franks*, 69 I. C. C. 627, decided July 10, 1922. The findings as to express companies in these respects are applicable to other carriers.

Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act. Compare *Int. Com. Com. v. Balt. & Ohio R. R.*, 225 U. S. 326; *Arizona Rates, Fares and Charges*, 61 I. C. C. 572; *Pacific Engineering & Construction Co. v. C. R. I. & P. Ry. Co.*, 56 I. C. C. 247. Section 22 provides in part that:

> • • • Nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat. • • • Nothing in this Act shall prevent any common carrier subject to this Act from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the commission (with or without a hearing). But in any such order the commission shall define such section and shall specify the period during which such reduced rates are to remain in effect.

The principal opposition to the proposed report came from the Association of Railway Executives. It is argued on behalf of this association that the free carriage of railway officials and employees authorized by the act includes a private car of another line occupied by one or more of them. In support thereof it is urged that such free carriage is universally recognized as not confined to the persons but includes their baggage, although baggage is property and the act does not specifically authorize its free transportation.

Baggage is usually transported without charge in addition to the passenger's fare, subject to certain restrictions as to weight and other matters. It is obvious that a person can not travel without certain property, such as clothing, and the transportation of this property is merely incidental to the transportation of the passenger. While the transportation of baggage may be spoken of as free, it is in reality covered by the passenger's fare. The property which may thus be transported without separate charge is defined in the tariffs, and when the weight permitted is exceeded separate charges are provided. Naturally, a person traveling on a pass is generally accorded the same baggage privileges as other passengers, and apparently he would have to pay the same charges as others on excess weight. There are other

limitations on the property which may be transported as baggage without separate charge; for example, such charges are often provided on bicycles and baby carriages. Recently certain carriers have provided for the checking of automobiles in baggage service at stated charges, which would apparently have to be paid whether the passenger is traveling on a pass or ticket. Such charges for the checking of certain articles are no doubt made because most passengers do not travel with these articles, and they are not considered ordinary or necessary baggage. In other words, their transportation is not such an ordinary and necessary incident to the transportation of the passenger as to require or warrant their transportation without additional charge. While the transportation of a private car may be in a sense incidental to the transportation of the persons riding therein, the use of such cars is certainly not so general that they may be considered an ordinary or necessary incident to the transportation of the passengers, as in the case of baggage. It seems clear from the foregoing that the free transportation of a private car can not be justified upon the same principle as the transportation of baggage.

As a matter of fact, the baggage tariffs specifically prohibit the checking of numerous articles which are commonly included in private cars, such as chinaware, foodstuffs, and furniture. Not only that but such articles beyond question would be subject to charges if shipped by freight or express. It is strange indeed if a railroad official is entitled to have articles transported free in a private car which could not be checked and would be subject to charges if shipped in any other manner. Surely if a person riding on a pass must pay to check a bicycle or automobile, the principle of free baggage can hardly be invoked in favor of a private car. A person riding on a pass is not entitled to have anything transported free which is not covered by the fare paid by any other passenger.

In our view it is too far-fetched to say that because a person lawfully entitled to use a pass may have transported free a limited amount of baggage he may also bring and have transported free a private car embracing a kitchen, dining room, stateroom, sitting room, and necessary equipment, supplies, and attendants. According to the views advanced on behalf of the railway executives the family, relatives, and friends of the official or employee in charge of the private car being transported free may without objection likewise be accommodated therein. And when the car is no longer needed it may, under their interpretation, be sent over foreign lines to its home station without charge, or if the car is at its home station and is desired elsewhere on foreign lines for use it may be brought without expense. Free transportation is contrary to the general policy of the act and the definiteness and clarity with which Congress has specified the

extent to which free transportation may be afforded by carriers subject to the act precludes the construction which counsel would have us place upon the pass provisions thereof.

The argument of the Association of Railway Executives that the carriers may lawfully haul the private cars of other lines without charge is also predicated on the theory that such a car is an instrumentality of commerce rather than an article of commerce. We are thus brought to a consideration of the question of when railway equipment generally may be transported without charge. Of course, a carrier may transport its own property without the payment of tariff charges. It would serve no useful purpose to require a carrier to transfer money from one pocket to another in payment of charges. Likewise, property which a carrier has hired or rented for the performance of its common-carrier duties may be transported the same as property which it owns. It is well known that freight cars and to some extent passenger cars move freely over foreign lines, and it may be helpful to consider the terms on which such cars are handled.

Freight cars in service are generally interchanged between the principal carriers throughout the country under rules of the American Railway Association. The carrier in possession of the car pays the owning line a certain amount for each day the car is on its line. This is referred to as per diem and is in the nature of rent for the use of the car. It is paid whether the car is loaded or empty, as the empty movement is considered incidental to the loaded movement, and the carrier in possession may permit an empty car to be loaded with revenue freight. This use of the freight cars of another carrier relieves the carrier in possession of the burden of furnishing its own equipment, which is a distinct benefit, and it participates in the revenue from the freight. Freight cars in regular service are not subject to transportation charges but such cars are subject to charges when the transportation is not in regular service. The consolidated classification provides certain charges per car per mile for the transportation of all kinds of railway equipment on their own wheels. For example, dining, parlor, and sleeping cars are charged from 23 to 30 cents per mile in the various territories. These charges apply on new cars moving from the place of manufacture to the home line before being placed in service, also on cars moving empty to and from repair shops off the home line, and on any other movements over foreign lines not in regular service. Apparently a car is in service when it is under load or has carried a load and is returning or seeking another load. In other words, so long as a car is being handled for revenue purposes, it is in service and not subject to charges; but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line.

Privately owned freight cars are also used by the carriers in transporting property of the owners. An allowance of so much per mile is paid by the carrier to the owner for the use of the car. This is based on the empty as well as the loaded movement, but if the empty movement exceeds the loaded movement the mileage allowance on the excess must be refunded, and in addition charges are assessed for the transportation of the car. Otherwise, no charge is made for the handling of a privately owned car in service, as its use benefits the carrier and is for revenue purposes. The charges in the consolidated classification for the transportation of cars not in service apply to privately owned as well as carrier equipment, no distinction being made because of private or carrier ownership.

Passenger cars of one carrier are sometimes operated over the lines of other carriers in maintaining through service. The terms on which this is done are a matter of contract, but in the absence of other arrangement the owning line is paid certain amounts per mile or per diem under rules of the American Railway Association. As in the case of freight cars, no charges are assessed for the handling of cars in service, but cars not in service are subject to the charges in the consolidated classification. The criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line.

Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum revenues. In the case of sleeping and parlor cars, charges for a one-way movement are based on the authorized fare for each passenger, with a minimum of 25 adult fares, but not less than $42 for the car and party. The charges for a round-trip movement are similar, except the 25 fares are doubled or must be for the round trip, and the minimum revenue is $84. In either case, the surcharge must be paid for each passenger, with a minimum of 25 surcharges, but this is not used in computing the minimum revenue per car. When a car is moved empty or in charge of porter or other attendants, charges are assessed on the basis of 10 regular adult one-way fares, plus the authorized fare for each porter or attendant, except not more than three employees of common carriers may be carried free. In this case also the minimum revenue is $42, including fares of attendants, but the surcharge is not collected. In some of the tariffs the charges for empty movements apply to carrier-owned as well as privately owned equipment. The tariffs also provide for application of the minimum fares and revenue on carrier-owned cars equipped for certain special purposes, such as advertising,

exhibition, instruction, and the like. These are the provisions generally in effect, although there may be variations on individual lines.

The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers. Apparently a private car owned by an individual even though a railroad official would be subject to the tariff charges on privately owned cars. It would seem that if a railroad official must pay to have his own car moved, the free transportation of his person authorized by the act could hardly be deemed to include a private car owned by his company.

It will be seen from the foregoing that tariff charges are provided for the transportation in freight trains of both carrier and privately owned cars of all kinds, when they are handled solely for the benefit of the owner and not for revenue purposes. It would not be seriously urged that such transportation could be rendered free if an attendant or other person having a pass should ride in the car. The tariffs also provide minimum charges for the transportation in passenger trains of special, privately owned, or chartered cars for the exclusive use of special parties. Apparently these minimum charges would not be lessened or affected in any way if a person or persons having passes should ride in the car. All of these charges show that there is nothing in the nature of railway equipment which justifies its transportation without charge, except when it is being handled for revenue purposes in the interest of the carrier performing the service. Even then the revenue from a passenger car used exclusively by a special party must be sufficient to warrant its transportation.

The propriety of tariff charges for the movement of railway equipment on its own wheels has been recognized by us in numerous cases. In two of them in fact we found that the charges assessed on freight cars were applicable even though they were transported under load. *Pacific Engineering & Construction Co.* v. *C., R. I. & P. Ry. Co.*, *supra*; *McCloud River Ry. Co.* v. *S. P. Co.*, 56 I. C. C. 287. Although charges are not generally assessed on cars under load, the charges assailed in the cases cited were upheld on the ground that the carriers had never agreed to accept the cars in interchange service. It was recognized that loaded cars are presumed to have been accepted in interchange service, but this presumption was found to have been overcome under the circumstances of these cases. Stated in another way, the charges were found applicable because the carriers had not hired the cars and they did not pay the usual mileage allowance for their use. In a more recent case we found that the charges assessed on certain cars hauled under load were not applicable because the cars had been accepted in interchange service and the mileage allowance was paid for their use. *Haffner Thrall Car Co.* v. *N. P. Ry. Co.*, 146 I. C. C. 47. The theory underlying these decisions is that a carrier may not assess

charges on a car which it has hired the use of, but it may and should assess charges when it has not hired the use of the car even though it is hauled under load.

The transportation of a private car of another carrier is ordinarily for the benefit of the owning line or its officials and not for revenue purposes. While ticket passengers may sometimes occupy such a car, they do so by invitation, and the carrier performing the transportation is not at liberty to make use of the car by putting other passengers in it. The returns to our questionnaire indicate that it is seldom, if ever, that the number of ticket passengers is sufficient to make the hauling of the private car of another carrier profitable to the carrier performing the service. This is further indicated by the additional fact that such passengers apparently do not pay the surcharge, which is assessed on persons riding in Pullman and privately owned or chartered cars. Indeed, the few ticket passengers sometimes riding in the private car of another carrier could probably be accommodated in other equipment that must be hauled anyhow, and the transporting carrier would receive more revenue if they rode in an ordinary Pullman car. Under these circumstances a carrier hauling the private car of another line can not be said to have hired its use, as it would have no interest in doing so and pays no rental therefor. Even if car hire should be provided on private cars, it would obviously be a mere subterfuge which could not change the legality of the practice. Our conclusion is that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its performance without charge, on the same principle as the free handling of revenue-producing equipment.

The Association of Railway Executives asserts that the carriers have always hauled the private cars of other lines without charge, that this practice has been well known to the commission, and that we have expressly approved it. It is contended, therefore, that we have interpreted the act as permitting the practice, and cases are cited to the effect that such an administrative interpretation is entitled to considerable weight where it is long continued and uniform.

In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of

the home line. The form of pass does not specifically indicate whether it is for home or foreign-line cars or both. It might in fact be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars.

It is also argued that where our pass regulations refer to passes for sleeping, parlor, *and other accommodations*, the words in italic include a private car of another line. We think those words were meant to cover such similar accommodations as a stateroom or berth on a steamer. A private car of another line can not be regarded as an accommodation furnished by the carrier issuing the pass. We do not see how the words in question can be given the construction sought.

Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge, and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. *The Tap Line Case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was *The Five Per Cent case*, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials.

It may be assumed that the practice of hauling the private cars of other lines without charge prevailed at the time of the passage of the act to regulate commerce. That, however, does not indicate an intention on the part of Congress to permit the practice, since, as stated in our third annual report, the law aimed at the correction of the abuses of free transportation. Nor can the long existence of the practice of issuing passes for foreign-line private cars be regarded as legalizing it. As previously stated, in *American Express Co.* v. *United States*, *supra*, the Supreme Court held that an express company

could not lawfully issue franks to certain classes of persons for the transportation of property, notwithstanding the contention that the custom of issuing such franks was one of long standing and no protest against the practice had been made to or by the commission. This is the first time that the lawfulness of the practice of issuing passes for foreign-line private cars has been brought in issue before us. Of course, good faith might be urged in defense of past violations, but obviously it could not be so urged in respect of a violation after the law has been construed by this commission.

It is urged that while the practice of transporting foreign-line private cars without charge is lawful our investigation has shown that the courtesy extended as between roads has in some instances been abused. It is proposed to correct such abuses by the adoption of a code of ethics limiting such courtesies and calling for reports to be rendered covering the movement of private cars on foreign lines. Counsel stresses the point that although the practice of transporting private cars without charge is of long standing we have not declared it unlawful. As previously stated, this is the first time the legality of the practice has been before us for decision. Apparently it is the first time the practice has been given serious consideration by the Association of Railway Executives since only after our investigation were the abuses of what they term a lawful courtesy discovered. There is no more reason for construing our failure to declare the practice unlawful as approving the practice, than there is for construing the failure of the executives to correct the long-existing abuses as approving them. After observing our finding that the transportation of private cars over foreign lines should be paid for through the assessment of a just and reasonable charge the executives will still have a duty to perform in eliminating unnecessary use of private cars and in thereby promoting efficient and economical management as contemplated by the act.

The Chicago & Eastern Illinois was the only carrier which filed exceptions to the proposed report. It urges that the assessment of charges for the movement of private cars over foreign lines would handicap it in the solicitation of traffic in the Southeast and Southwest. This line is a part of through routes to and from points in those territories which it can reach only over the rails of its connections, while certain competitors such as the Illinois Central and the Santa Fe extend all the way to many of the important southeastern or southwestern points. Apparently the Chicago & Eastern Illinois has been sending its private cars over the lines of its competitors as well as other carriers for the purpose of soliciting traffic in their territory. It is not clear why the use of private cars is so important in the solicitation of traffic, which is ordinarily handled by traffic

representatives, such as this line has at various points in the Southeast and Southwest. During the three years covered by our questionnaire, the private cars of the Chicago & Eastern Illinois traveled 28,274 miles on foreign lines, while it hauled the private cars of other carriers 44,223 miles. The assessment of reasonable charges for such movements would, therefore, have been to the advantage of this carrier.

Reciprocity between carriers is no justification for the free transportation of private cars. It will be observed that railway equipment generally which is not in revenue service is not handled on that principle, and it could not be so handled lawfully. Moreover, the returns to our questionnaire show that there is seldom a fair balance between the service performed by different carriers in transporting the private cars of each other. On the contrary, the returns show that there is often a wide difference in the relative amount of service performed in hauling such cars. No one has contended that the theory of reciprocity warrants the free handling of private cars. Transportation must be paid for in cash and not in commodities or services. *In re Contracts for Free Transportation*, 16 I. C. C. 246; *United States* v. *C. I. & L. Ry. Co.*, 163 Fed. 114; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 270.

As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by 1 passenger or 25. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenue are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them. In so far as these charges do not apply to the private cars of other carriers, they are unjustly discriminatory and unduly preferential and prejudicial. See *In the Matter of Restricted Rates*, 20 I. C. C. 426, wherein it was found in violation of sections 2 and 3 to charge less for the transportation of railway coal than the rates charged on commercial coal. This decision was upheld by the Supreme Court in *Int. Com. Com.* v. *Balt. & Ohio R. R.*, *supra*.

We find that the transportation or movement of private passenger cars, including so-called office cars, by one carrier for another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act. The assessment of a just and reasonable charge by carriers transporting private cars for others, and for services rendered in connection therewith, is not

only required by the act but will be in keeping with efficient and economical management.

This finding does not extend to the point of saying that it is unlawful for private cars of one carrier to be transported over the lines of other carriers, but is confined to the assertion that under existing law the transportation of private cars on foreign lines should be paid for through the assessment of a just and reasonable charge.

As shown in Appendix A, a substantial percentage of the occupants of private cars hauled free, or at less than tariff rates, were business associates, relatives, or friends holding tickets which entitled them only to transportation in the ordinary coach. A total of 22,391 passenger-miles were traveled by such persons in private cars of the Nickel Plate and a total of 208,203 passenger-miles were traveled by such persons in private cars of the Chicago, Rock Island & Pacific during the three-year period. The returns of other carriers show similar travel.

Carriers according passengers the comforts and facilities of private cars, including berth and other accommodations, are treating unequally and unfairly the passengers accorded the ordinary coach facilities but who are charged at the same rate as those traveling in private cars, and they also discriminate against those who pay the surcharge for riding in ordinary sleeping or parlor cars and privately owned or chartered cars.

It is provided in section 2 of the act:

> That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

It is also provided in paragraph 1 of section 3 of the act:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Association of Railway Executives urges that the question of whether it is unjustly discriminatory and unduly prejudicial to furnish private-car accommodations to invited guests without charge

depends upon the circumstances of each individual case. They seem to think that circumstances may warrant the furnishing of a berth and other accommodations in a private car without charge, provided only that the passenger has purchased a ticket entitling him to passage. We are unable to see how a berth or other accommodations for which a tariff charge is usually made can be furnished free any more than a passenger can be carried without charge. A carrier which furnishes free a berth or other accommodations in a private car similar to those for which tariff charges would be assessed if the passenger rode in a Pullman car is clearly guilty of violating section 6 of the act.

It is suggested that the furnishing of a berth or other accommodations in a private car is merely a courtesy extended by one passenger to another. The furnishing of a berth or other accommodations in a Pullman or private car without charge to a person not lawfully entitled to free transportation is just as clear a violation of the spirit and plain intent of the act as carriage without the purchase of a coach ticket.

The railway executives further urge that a hearing must be held in each individual case to determine whether the circumstances and conditions are so similar as to warrant an order requiring the removal of the discrimination and prejudice. This argument sounds like that made by the carriers soon after the passage of the act to regulate commerce. It was contended then that a difference in circumstances and conditions warranted the issuance of passes to certain classes of persons, such as public officials. That contention was rejected in *In Re Persons Free or at Reduced Rates by B. & M. R. R. Co.*, 5 I. C. C. 69, 78; and *William H. Harvey* v. *Louisville & Nashville R. R. Co.*, 5 I. C. C. 15.

One of the fundamental purposes of the act is "to compel the carrier as a public agent to give equal terms to all" and "to cut up by the roots every form of discrimination, favoritism, and inequality." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *L. & N.* v. *Mottley*, 219 U. S. 467; *U. S.* v. *Union Stock Yard*, 226 U. S. 286.

We further find that the transportation of persons in private passenger cars, including berth and other accommodations for which a charge is made in Pullman cars, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory, unduly preferential of the former, and unduly prejudicial to the latter as well as those who pay the surcharge for riding in ordinary sleeping or parlor cars and privately owned or chartered cars.

The carriers will be expected to cease and desist from the violations of the act herein found, but in view of the penalties provided for such violations, no order appears to be necessary.

BRAINERD, *Commissioner*, dissenting in part:

The majority's decision is based upon information obtained by the commission from returns made to a questionnaire sent to Class I and II carriers. No hearing has been held and no opportunity for the introduction of evidence or the examination or cross-examination of witnesses has been granted. This report is adopted over the carriers' exceptions based in part upon a failure to accord them a full hearing. While I concur in much if not all that is said by the majority, I do not wish to be understood as approving the practice of adopting formal reports containing findings of fact or conclusions of law based upon an investigation, whether upon our own motion or otherwise, without having first held a hearing at which all parties have been afforded an opportunity to introduce evidence and examine and cross-examine witnesses in such manner as may be necessary to conform to the requirements of due process of law. The more liberal the practice, the more imperative the obligation to preserve the essential rules by which rights are determined.

I am authorized to state that COMMISSIONERS WOODLOCK and PORTER concur in the views herein expressed.

# APPENDIX A

*Comparative*

| | Number of private cars | Home cars on home railroad: Transportation: Trips | Home cars on home railroad: Transportation: Carload pounds | Home cars on home railroad: Transportation: Passengers: Paid | Home cars on home railroad: Transportation: Passengers: Ticketed | Home cars on home and foreign railroads: Transportation: Trips | Home cars on home and foreign railroads: Transportation: Carload pounds | Home cars on home and foreign railroads: Transportation: Passengers: Paid | Home cars on home and foreign railroads: Transportation: Passengers: Ticketed | Foreign cars on home railroad: Transportation: Trips | Foreign cars on home railroad: Transportation: Carload pounds | Foreign cars on home railroad: Transportation: Passengers: Paid | Foreign cars on home railroad: Transportation: Passengers: Ticketed | Cost of repairs and other charges while on own line: Assessed to own line | Cost of repairs and other charges while on own line: Assessed to owners on foreign railroad |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Class I roads | | | | | | | | | | | | | | | |
| Year 1923 | 917 | 19,033 | 60,3[illegible] | 39,0[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | $[illegible] | $[illegible] |
| Year 1924 | 930 | 18,538 | 61,3[illegible] | 39,6[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1925 | 946 | 19,[illegible] | 64,[illegible] | 42,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Total, Class I roads | | 56,121 | 186,[illegible] | 121,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Class II roads | | | | | | | | | | | | | | | |
| Year 1923 | 61 | 174 | 5[illegible] | 3,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1924 | 61 | 194 | 5[illegible] | 3,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1925 | 665 | 142 | 3[illegible] | 3,[illegible] | | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Total, Class II roads | | 510 | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Switching and terminal roads | | | | | | | | | | | | | | | |
| Year 1923 | 4 | 3 | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1924 | 4 | 3 | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1925 | 4 | 3 | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | | [illegible] | [illegible] |
| Total, switching and terminal roads | | [illegible] | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Yearly totals | | | | | | | | | | | | | | | |
| Year 1923 | | 19,179 | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1924 | | 18,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Year 1925 | | 19,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Grand total (3 years) | | 56,[illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |

NOTE.—The apparent discrepancies between the number of trips and carloads as shown under the heading "Home cars on home and foreign railroads" and the amounts headed "Foreign cars on home railroads" is due (a) to differences in methods of keeping records and reporting, (b) the fact that the switching road sheets one report covering trips containing several foreign lines (each handling line making a separate report), and (c) the trips of private cars of the American Railway Express System, Western Union, Pullman Company officials and small roads which were not included in the order and did not file returns.

## APPENDIX B

*Statement showing, for 3 year period, the mileage made by private passenger-train cars on lines of carriers listed below*

The column "Home cars on home roads" contains the home-line portion of trips made on home and foreign lines. The asterisk (*) indicates roads whose private-car mileage on foreign lines exceeded the mileage on the home line and whose foreign-line mileage was greater than the mileage furnished foreign-line private cars.

| Name of railroad | Mileage | | |
|---|---|---|---|
| | Home cars on home roads | Home cars on foreign roads | Foreign cars on home roads |
| Class I roads | | | |
| Ann Arbor R. R.* | 49,439 | 57,078 | 4,284 |
| Akron, Canton & Youngstown* | 1,621 | 13,350 | 105 |
| Atchison, Topeka & Santa Fe | | | |
| Gulf, Colorado & Santa Fe | 3,583,454 | 139,902 | 548,018 |
| Panhandle & Santa Fe | | | |
| Atlanta & West Point | | | |
| Western Ry. of Alabama | 44,279 | 7,879 | 18,465 |
| Atlanta, Birmingham & Atlantic | 119,471 | 3,947 | 1,051 |
| Atlantic Coast Line | 735,231 | 96,507 | 456,683 |
| Baltimore & Ohio | 1,107,107 | 160,985 | 247,825 |
| Bangor & Aroostook | 73,595 | 31,053 | 1,777 |
| Bessemer & Lake Erie | 10,876 | 1,968 | 469 |
| Birmingham & Southern | 1,607 | 60 | 41 |
| Boston & Albany | 29,898 | 4,184 | 34,024 |
| Boston & Maine | 57,323 | 15,701 | 105,891 |
| Buffalo & Susquehanna | 2,119 | 1,307 | |
| Buffalo, Rochester & Pittsburgh | 82,086 | 35,150 | 36,507 |
| Canadian National, mileage in United States only | 21,919 | | 1,019 |
| Canadian Pacific | 47,067 | 6,010 | 1,373 |
| Central of Georgia | 343,488 | 62,013 | 51,302 |
| Central R. R. of N. J. | 57,669 | 11,835 | 5,520 |
| Central Vermont | 58,110 | 42,508 | 58,318 |
| Charleston & Western Carolina* | 31,315 | 45,895 | 4,214 |
| Chesapeake & Ohio | 593,054 | 111,465 | 169,305 |
| Chicago & Alton | 256,129 | 90,050 | 43,716 |
| Chicago & Eastern Illinois | 71,095 | 28,274 | 44,223 |
| Chicago & North Western | 700,031 | 32,063 | 81,191 |
| Chicago, Burlington & Quincy | 2,321,624 | 336,847 | 316,703 |
| Chicago Great Western | 102,812 | 40,744 | 40,936 |
| Chicago, Indianapolis & Louisville | 90,591 | 9,345 | 40,356 |
| Chicago, Milwaukee & St. Paul | 2,003,595 | 118,013 | 158,151 |
| Chicago, Rock Island & Pacific | 917,857 | 184,773 | 246,249 |
| Chicago, Rock Island & Gulf | | | |
| Chicago, St. Paul, Minneapolis & Omaha | 30,541 | 18,986 | 45,061 |
| Cincinnati, Indianapolis & Western | 17,603 | 17,472 | 3,804 |
| Cleveland, Cincinnati, Chicago & St. Louis | | | |
| Cincinnati Northern | 459,653 | 147,196 | 212,911 |
| Evansville, Indianapolis & Terre Haute | | | |
| Peoria & Eastern | | | |
| Clinchfield | 38,906 | 7,197 | 12,153 |
| Columbus & Greenville | | | 552 |
| Colorado & Wyoming* | 318 | 12,873 | |
| Cumberland & Pennsylvania* | 349 | 43,613 | |
| Delaware & Hudson* | 110,309 | 137,378 | 32,000 |
| Delaware, Lackawanna & Western | 123,606 | 42,614 | 15,604 |
| Denver & Rio Grande Western | 433,106 | 91,999 | 97,901 |
| Denver & Salt Lake* | 4,132 | 8,465 | 478 |
| Detroit & Mackinac | 9,313 | 266 | 784 |
| Detroit & Toledo Shore Line | | | 450 |
| Detroit, Toledo & Ironton | | | 2,729 |
| Duluth & Iron Range | 11,934 | 10,208 | 6,894 |
| Duluth, Missabe & Northern* | 22,100 | 36,759 | 4,875 |
| Duluth, South Shore & Atlantic | 48,816 | 7,024 | 3,118 |
| Duluth, Winnipeg & Pacific | | | 14,490 |
| Elgin, Joliet & Eastern | 1,868 | 4,921 | |
| Florida East Coast | 83,056 | 68,456 | 157,129 |
| Fort Smith & Western | 25,998 | 155 | |
| Georgia & Florida* | 46,913 | 53,640 | 1,755 |
| Georgia R. R. | 55,608 | 1,002 | 29,720 |
| Grand Trunk Western | 78,728 | 34,779 | 82,039 |

| Name of railroad | Mileage | | |
|---|---|---|---|
| | Home cars on home roads | Home cars on foreign roads | Foreign cars on home roads |
| *Class I roads*—Continued | | | |
| Erie R. R. | | | |
| Chicago & Erie | | | |
| New York, Susquehanna & Western | 545,759 | 119,049 | 108,801 |
| Wilkes-Barre & Eastern | | | |
| Northern Railroad of New Jersey | | | |
| Great Northern | 1,361,500 | 154,194 | 165,151 |
| Green Bay & Western | | | |
| Kewaunee, Green Bay & Western | 5,226 | | 896 |
| Ahnapee & Western | | | |
| Gulf & Ship Island | | | [1] 14,687 |
| Gulf Coast Lines | 140,784 | 44,160 | 107,610 |
| Gulf, Mobile & Northern | 132,089 | 39,851 | 5,418 |
| Hocking Valley* | 15,587 | 17,486 | 10,628 |
| Illinois Central | 1,288,374 | 229,770 | 314,172 |
| Yazoo & Mississippi Valley | 110,985 | 75,475 | 69,136 |
| International Great Northern | 46,985 | 58,038 | 4,731 |
| Kansas City, Mexico & Orient* | | | |
| Kansas City Southern | 284,557 | 141,640 | 19,968 |
| Texarkana & Fort Smith | 30,288 | | 587 |
| Kansas, Oklahoma & Gulf | 1,250 | 1,979 | 484 |
| Lake Superior & Ishpeming* | 3,800 | 640 | 2,243 |
| Lehigh & Hudson | 8,566 | 2,472 | 803 |
| Lehigh & New England | 199,405 | 79,263 | 18,209 |
| Lehigh Valley | 32,376 | 34,034 | 5,936 |
| Long Island* | 73,510 | 2,640 | 4,281 |
| Louisiana & Arkansas | 5,174 | 753 | 5,081 |
| Louisiana Ry. & Navigation Co. | 29,711 | 2,203 | 1,102 |
| Louisiana Ry. & Navigation Co. of Texas | 469,376 | 107,440 | 147,830 |
| Louisville & Nashville | 7,838 | 196 | 5,178 |
| Louisville, Henderson & St. Louis | 21,382 | 2,028 | 41,521 |
| Maine Central | 436,184 | 143,797 | 180,030 |
| Michigan Central | 29,502 | (1) | 589 |
| Midland Valley | 122,928 | 14,051 | 8,004 |
| Minneapolis & St. Louis | 209,859 | 92,034 | 89,009 |
| Minneapolis, St. Paul & Sault Ste. Marie | 19,818 | 8,572 | 164 |
| Mississippi Central | 8,414 | | |
| Missouri & North Arkansas | 497,119 | 149,786 | 144,786 |
| Missouri-Kansas-Texas | 1,314,898 | 233,250 | 190,730 |
| Missouri-Kansas-Texas of Texas | 333,388 | 73,454 | 16,346 |
| Missouri Pacific | | | 4,192 |
| Mobile & Ohio | | | 132 |
| Monongahela | 124,087 | 48,766 | 35,021 |
| Montour | 18,490 | 42,392 | 1,906 |
| Nashville, Chattanooga & St. Louis | 11,365 | 51,315 | 1,002 |
| Nevada Northern* | | | |
| New Orleans-Great Northern* | 1,315,769 | 313,253 | 623,650 |
| New York Central | 378,198 | 254,814 | 26,693 |
| Ohio Central Lines | 148,075 | 72,798 | 109,965 |
| New York, Chicago & St. Louis | 30,411 | 644 | 5,832 |
| New York, New Haven & Hartford | 419,470 | 192,727 | 146,793 |
| New York, Ontario & Western | 73,711 | 41,069 | 6,310 |
| Norfolk & Western | 1,472,087 | 134,232 | 198,876 |
| Norfolk Southern | 48,135 | 24,970 | 2,384 |
| Northern Pacific | 2,048,556 | 307,264 | 720,473 |
| North Western Pacific | 196,627 | 30,781 | 50,554 |
| Pennsylvania | | | |
| Pere Marquette | 20,621 | 65,312 | 9,901 |
| Pittsburgh & Lake Erie* | | | |
| Youghiogheny Northern | 2,308 | 416 | 160 |
| Lake Erie & Eastern | 1,074 | 16,873 | |
| Pittsburg & Shawmut | | | 414 |
| Pittsburgh & West Virginia* | 53,645 | 52,962 | 7,143 |
| Pittsburg, Shawmut & Northern | 18,727 | 53,271 | 227,312 |
| Reading System | 9,113 | 29,073 | 40,139 |
| Richmond, Fredericksburg & Potomac | | | |
| Rutland | 1,146,602 | 172,435 | 129,508 |
| St. Louis-San Francisco | | | |
| St. Louis-San Francisco Ry. of Texas | 590,783 | 99,165 | 22,584 |
| St. Louis Southwestern | | | |
| St. Louis Southwestern of Texas | 39,621 | 13,972 | 7,262 |
| San Antonio, Uvalde & Gulf | 628,940 | 139,933 | 175,611 |
| Seaboard Air Line | 2,243,138 | 308,019 | 352,530 |
| Southern System | 1,991,832 | 426,064 | 771,044 |
| Southern Pacific | 625,790 | 144,582 | 270,790 |
| Southern Pacific in Texas | | | |

[1] No record.

| Name of railroad | Mileage | | |
|---|---|---|---|
| | Home cars on home roads | Home cars on foreign roads | Foreign cars on home roads |
| *Class I roads*—Continued | | | |
| Spokane International | | | 4,544 |
| Spokane, Portland & Seattle | 82,249 | 20,704 | 69,948 |
| Tennessee Central | 32,784 | 1,678 | 2,651 |
| Texas & Pacific | 510,377 | 81,678 | 81,098 |
| Toledo, Peoria & Western | 5,306 | 4,541 | 4,080 |
| Tampa & Gulf Coast | | | 5,005 |
| Trinity & Brazos Valley | 40,049 | 11,819 | 6,342 |
| Ulster & Delaware | | | 222 |
| Union Pacific | | | |
| Oregon-Washington R. R. & Nav. Co. | | | |
| Oregon Short Line | 3,022,909 | 281,964 | 469,155 |
| Los Angeles & Salt Lake | | | |
| St. Joseph & Grand Island | | | |
| Virginian | 71,830 | 44,523 | 4,306 |
| Wabash | 394,092 | 128,896 | 92,958 |
| Western Maryland | 21,050 | 8,154 | 2,208 |
| Western Pacific | 121,306 | 26,150 | 46,978 |
| Wheeling & Lake Erie | 98,316 | 58,031 | 1,417 |
| *Class II roads* | | | |
| Apache Railway | | | 1,008 |
| Ashley, Drew & Northern | | | 41 |
| Arkansas & Louisiana Missouri | 711 | 891 | 161 |
| Birmingham & Northwestern | | | 797 |
| Birmingham & Southeastern | | | 30 |
| Blue Ridge Railway | | | 83 |
| Brimstone Railway & Canal | | | 13 |
| Butler County Ry | | | 133 |
| Cambria & Indiana | | | 428 |
| Chesapeake Beach | 687 | | 13 |
| Chestnut Ridge | | | 4 |
| Christie & Eastern | | | 22 |
| Cisco & Northeastern | | | 112 |
| Clinton & Oklahoma Western | | | 302 |
| Charlotte Harbor & Northern | | | 3,491 |
| Columbia, Newberry & Laurens | | | 525 |
| Copper Range* | 598 | 2,428 | 84 |
| Cornwall R. R | | | 22 |
| Dayton & Goose Creek | | | 46 |
| De Queen & Eastern | | | 136 |
| Durham & Southern | | | 2,131 |
| East Broad Top R. R. & Canal Co | 1,054 | | |
| Escanaba & Lake Superior | 510 | | 508 |
| Fonda, Johnstown & Gloversville | 1,389 | | 52 |
| Georgia, Florida & Alabama | 434 | 1,148 | 1,953 |
| Georgia, Southwestern & Gulf | | | 288 |
| Gulf & Sabine River | | | 24 |
| Huntingdon & Broad Top* | 3,310 | 7,624 | |
| Illinois Terminal Co | | | 33 |
| Interstate R. R* | 4,296 | 21,544 | 74 |
| Jefferson Southwestern | | | 22 |
| Lake Erie, Franklin & Clarion | 836 | | |
| Ligonier Valley | | | 84 |
| Live Oak, Perry & Gulf | | | 44 |
| Longview, Portland & Northern* | 10 | 6,832 | 60 |
| Louisiana & Pacific* | 157 | 54,214 | |
| Louisiana & Northwest | 992 | 887 | 99 |
| Louisville & Wadley | | | 40 |
| Midland Terminal* | 113 | 19,027 | |
| Macon, Dublin & Savannah | 1,488 | 940 | 7,116 |
| Manistee & Northeastern | | | 1,049 |
| Magna Arizona | | | 282 |
| Mineral Range | 776 | | |
| Minneapolis & Rainy River | | | 76 |
| Minarets & Western | | | 106 |
| Minneapolis, Northfield & Southern* | 160 | 15,058 | |
| Minneapolis, Red Lake & Manitoba | | | 48 |
| Missouri Southern | | | 324 |
| Mississippi Southern | | | 104 |
| Minnesota & International | 19,450 | 6,676 | 7,615 |
| Mississippi River & Bonne Terre | | | 119 |
| Missouri Illinois | | | 140 |
| Nevada, California, Oregon | 4,420 | | |
| Newport & Richford | 3,457 | 9,312 | 366 |
| New Jersey & Indiana | | | 408 |
| Oklahoma City-Ada-Atoka | 5,618 | 2,236 | 504 |
| Pacific & Idaho Northern | 5,160 | | |

| Name of railroad | Mileage | | |
|---|---|---|---|
| | Home cars on home roads | Home cars on foreign roads | Foreign cars on home roads |
| *Class II roads*—Continued | | | |
| Piedmont & Northern* | 2,000 | 73,888 | |
| Pittsburgh, Lisbon & Western | | | 46 |
| Quanah, Acme & Pacific Ry.* | 2,560 | 37,633 | 586 |
| Raleigh & Charleston | | | 150 |
| Raritan River | | | 24 |
| Red River & Gulf | | | 158 |
| Rio Grande & Eagle Pass | | | 46 |
| Roscoe, Snyder & Pacific | | | 30 |
| San Diego & Arizona* | 8,796 | 25,936 | 7,872 |
| Savannah & Atlanta | | | 580 |
| Sewell Valley | | | 240 |
| Sierra Ry. Co. of California | | | 790 |
| South Georgia Ry | | | 213 |
| Sugarland Ry.* | 268 | 41,250 | |
| Tampa & Gulf | | | 5,005 |
| Tallulah Falls | | | 112 |
| Tennessee R. R | 312 | | |
| Texas Midland* | 1,001 | 23,128 | |
| Texas Mexican* | 15,184 | 20,731 | 1,164 |
| Texas Southeastern | | | 90 |
| Tonopah & Goldfield | 2,248 | 1,858 | 62 |
| Tonopah & Tidewater | 4,636 | | 1,506 |
| Bullfrog & Goldfield | | | 452 |
| Tuckerton | 968 | 3,058 | 264 |
| Tucson, Cornelia & Gila Bend* | | | 323 |
| Virginia & Truckee Ry | | | 188 |
| Washington, Idaho & Montana | | | 528 |
| Weatherford, Mineral Wells & Northwestern | | | 40 |
| Western Allegheny | 10,813 | 1,672 | 206 |
| Wichita Falls & Southern R. R | | | 984 |
| Winston-Salem Southbound | | | 108 |
| Wrightsville & Tennille | | | 2,340 |
| Yosemite Valley | | | |
| *Switching and terminal roads* | | | |
| Alton & Southern | 264 | | 247 |
| Belt Ry. of Chicago | | | 351 |
| Chicago & Western Indiana | 67 | 1,096 | 11 |
| Chicago Junction* | | | 3,207 |
| Indiana Harbor Belt | | | 41 |
| Indianapolis Union | | | 55 |
| Peoria Railway Terminal Co | | | 41 |
| Portland Terminal Ry | | | |
| Terminal Ry. Ass'n of St. Louis* | | 14,268 | 4,582 |
| Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans | | | 295 |
| Toledo Terminal R. R | | | 748 |
| Troy Union Railroad | | | 2 |
| Union Ry. (Tenn.) | | | |
| Union R. R. (Penn.) | 88 | | |

## APPENDIX C

*Movement of private cars occupied by directors of Pennsylvania Railroad*

| Date | Destination | Mileage | |
|---|---|---|---|
| | | Home line | Foreign lines |
| First director: | | | |
| Jan. 6, 1923 | Palm Beach, Fla | 270 | 2,281 |
| June 29, 1923 | Mount Desert Ferry, Me | 182 | 1,056 |
| Sept. 21, 1923 | do | 182 | 1,056 |
| Jan. 10, 1924 | Palm Beach, Fla | 269 | 2,135 |
| Feb. 22, 1924 | do | 270 | 2,110 |
| June 30, 1924 | Mount Desert Ferry, Me | 182 | 1,056 |
| July 23, 1924 | do | 182 | 1,056 |
| Jan. 15, 1925 | Palm Beach, Fla | 270 | 2,149 |
| Feb. 11, 1925 | do | 269 | 2,149 |
| Mar. 26, 1925 | Deadhead one way | 270 | 2,149 |
| June 30, 1925 | Mount Desert Ferry, Me., deadhead return | 182 | 1,056 |
| Second director: | | | |
| Aug. 20, 1923 | Boston, Mass | 875 | 491 |
| Oct. 12, 1923 | Hot Springs, Va | 736 | 570 |
| Jan. 15, 1924 | Norfolk, Va | 1,022 | 375 |
| Jan. 21, 1924 | do | 270 | 375 |
| Feb. 13, 1924 | Miami, Fla | 270 | 2,239 |
| Mar. 20, 1924 | do | 270 | 2,239 |
| Nov. 23, 1924 | Norfolk, Va., deadhead one way | 270 | 443 |
| Dec. 30, 1924 | Lake Placid, N. Y | 524 | 666 |
| Jan. 29, 1925 | Miami, Fla | 624 | 2,515 |
| Jan. 16, 1925 | Elizabeth City, N. C | 1,434 | 982 |
| Apr. 5, 1925 | Miami, Fla | 852 | 2,281 |
| Nov. 20, 1925 | Elizabeth City, N. C | 1,066 | 839 |
| Third director: | | | |
| Feb. 9, 1923 | Fayetteville, N. C | 270 | 655 |
| Feb. 20, 1923 | Pinehurst, N. C | 216 | 702 |
| Mar. 16, 1923 | Fayetteville, N. C | 270 | 653 |
| Mar. 23, 1923 | Pinehurst, N. C | 270 | 694 |
| Feb. 19, 1924 | do | 270 | 698 |
| Mar. 18, 1924 | do | 270 | 702 |
| Jan. 20, 1925 | Fayetteville, N. C | 450 | 655 |
| Feb. 25, 1925 | Pinehurst, N. C | 269 | 705 |
| Mar. 18, 1925 | do | 270 | 728 |
| Apr. 8, 1925 | Fayetteville, N. C | 270 | 655 |
| Dec. 3, 1925 | do | 270 | 655 |
| Fourth director: | | | |
| Feb. 3, 1923 | South Boca Grande, Fla | 270 | 2,252 |
| Mar. 22, 1923 | do | 269 | 2,084 |
| Sept. 6, 1923 | Naponoch, N. Y | 212 | 206 |
| Sept. 19, 1923 | do | 212 | 206 |
| Jan. 15, 1924 | South Boca Grande, Fla | 269 | 2,116 |
| Mar. 23, 1924 | do | 270 | 2,317 |
| Sept. 8, 1924 | Napanoch, N. Y | 195 | 206 |
| Sept. 22, 1924 | Napanoch, N. Y., deadhead going | 197 | 412 |
| Fifth director: | | | |
| Aug. 1, 1923 | Boston, Mass | 182 | 464 |
| Aug. 31, 1923 | do | 182 | 464 |
| Aug. 1, 1924 | Boston, Mass., deadhead return | 182 | 464 |
| Aug. 30, 1924 | Boston, Mass., deadhead going | 182 | 464 |
| Aug. 1, 1925 | Boston, Mass., deadhead return | 182 | 464 |
| Aug. 31, 1925 | Boston, Mass., deadhead going | 182 | 464 |
| Sixth Director: | | | |
| Feb. 6, 1923 | South Boca Grande, Fla | 270 | 2,114 |
| Mar. 20, 1923 | do | 270 | 2,086 |
| Apr. 22, 1924 | Brunswick, Ga | 270 | 1,462 |
| Aug. 17, 1925 | ——, Canada, deadhead return | 182 | 1,448 |
| Sept. 9, 1925 | Montreal, Canada, deadhead going | 182 | 1,093 |
| Seventh director: | | | |
| Nov. 22, 1924 | Charleston, S. C | 269 | 1,025 |
| Jan. 3, 1925 | do | 450 | 1,025 |
| Jan. 30, 1925 | Palm Beach, Fla., deadhead one way | 270 | 2,519 |
| Feb. 25, 1925 | do | 270 | 2,519 |
| Nov. 17, 1925 | Charleston, S. C | 269 | 1,025 |
| Eighth director: | | | |
| Feb. 13, 1923 | Miami, Fla | 363 | 2,759 |
| Mar. 9, 1923 | Ormond, Fla | 270 | 1,754 |
| Aug. 23, 1923 | Buffalo, N. Y | 507 | 485 |

## APPENDIX D

*Movement of private cars occupied by a vice president of one carrier and executive of others*

| Car | Reported leaving | Date | For— | Returned to— | Date | Mileage: On reporting road | Mileage: On foreign lines |
|---|---|---|---|---|---|---|---|
| D. & H. report: | | | | | | | |
| D. & H. 400 | Albany, N. Y. | Jan. 21, 1923 | Chicago, Ill., and San Francisco, Calif. | Albany, N. Y. | Mar. 2, 1923 | 15 | 7,127 |
| Do | do | Apr. 30, 1923 | New York, N. Y. | do | May 3, 1923 | | 282 |
| Do | do | May 13, 1923 | Lyon Mountain and New York, N. Y. | do | May 8, 1923 | 407 | 574 |
| Do | do | May 16, 1923 | Washington, D. C. | do | May 24, 1923 | 5 | 2,435 |
| Do | do | June 17, 1923 | Chicago, Ill. | do | June 23, 1923 | 5 | 2,125 |
| Do | do | June 23, 1923 | Lyon Mountain and New York, N. Y. | do | June 29, 1923 | 816 | 284 |
| Do | Plattsburg, N. Y. | July 8, 1923 | San Francisco, Calif. | do | July 27, 1923 | 102 | 7,157 |
| Do | Albany, N. Y. | July 28, 1923 | Lyon Mountain and Plattsburg, N. Y. | do | Aug. 3, 1923 | 732 | 438 |
| Do | Lyon Mountain, N. Y. | Aug. 15, 1923 | New York, N. Y. | do | Aug. 22, 1923 | 402 | 200 |
| Do | do | Aug. 20, 1923 | do | do | do | 202 | 284 |
| D. & H. 199 | Albany, N. Y. | Aug. 25, 1923 | Plattsburg and New York, N. Y. | do | Aug. 27, 1923 | 102 | 200 |
| D. & H. 500 | do | Sept. 13, 1923 | Lyon Mountain and New York, N. Y. | do | Sept. 18, 1923 | 402 | 284 |
| D. & H. 400 | do | Sept. 27, 1923 | San Francisco, Calif. | do | Oct. 12, 1923 | 234 | 6,722 |
| D. & H. 500 | Lyon Mountain, N. Y. | Nov. 6, 1923 | New York, N. Y. | do | Nov. 8, 1923 | 407 | 443 |
| D. & H. 400 | Albany, N. Y. | Nov. 28, 1923 | Lyon Mountain and New York, N. Y. | do | Dec. 5, 1923 | 407 | 200 |
| Do | do | Dec. 23, 1923 | New York, N. Y. | do | Dec. 28, 1923 | 201 | 284 |
| Do | Lyon Mountain, N. Y. | Jan. 1, 1924 | do | do | Jan. 3, 1924 | 47 | 284 |
| D. & H. 500 | do | Jan. 26, 1924 | do | do | Jan. 29, 1924 | 407 | 300 |
| Do | Albany, N. Y. | Feb. 14, 1924 | do | Troy, N. Y. | Feb. 14, 1924 | 396 | 858 |
| D. & H. 400 | do | Mar. 19, 1924 | Lyon Mountain and New York, N. Y. | Albany, N. Y. | Mar. 26, 1924 | 402 | 574 |
| Do | do | Apr. 10, 1924 | Chicago, Ill., Lyon Mountain, and New York, N. Y. | do | Apr. 30, 1924 | 402 | 3,150 |
| Do | do | May 7, 1924 | New Orleans, La. | do | May 30, 1924 | | 6,539 |
| Do | do | May 30, 1924 | Lyon Mountain, N. Y., and Toledo, Ohio | do | June 11, 1924 | 402 | 1,409 |
| Do | do | June 18, 1924 | New York, N. Y. | do | June 20, 1924 | 416 | 573 |
| Do | do | June 30, 1924 | Lyon Mountain and New York, N. Y. | do | July 3, 1924 | 413 | 284 |
| Do | do | July 14, 1924 | do[2] | do | July 31, 1924 | 1,500 | 3,268 |
| D. & H. 199 | do | July 15, 1924 | Louisville, Ky. | do | July 22, 1924 | 296 | 1,192 |
| D. & H. 400 | do | Aug. 23, 1924 | Lyon Mountain and New York, N. Y. | do | Aug. 26, 1924 | 402 | 148 |
| Do | do | Aug. 28, 1924 | North Bay, Ontario | do | Sept. 4, 1924 | 545 | 718 |
| Do | do | Sept. 8, 1924 | Lyon Mountain, New York, and Plattsburg, N. Y. | do | Sept. 15, 1924 | 1,211 | 870 |
| Do | do | Sept. 25, 1924 | New York, N. Y. | do | Oct. 8, 1924 | 402 | 432 |
| Do | do | Oct. 11, 1924 | Lyon Mountain and New York, N. Y. | do | Oct. 29, 1924 | 944 | 3,658 |
| Do | do | Oct. 30, 9124 | New York and Lyon Mountain, N. Y. | do | Nov. 15, 1924 | 402 | 299 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Wabash report: | | | | | | | |
| Wab. 400 | New York, N. Y. | Nov. 15, 1924 | Albany and Lyon Mountain, N. Y. | New York, N. Y. | Nov. 17, 1924 | | 692 |
| Do | do | Nov. 21, 1924 | Albany, N. Y. | do | Nov. 24, 1924 | | 692 |
| Do | do | Nov. 26, 1924 | do | do | Dec. 1, 1924 | | 692 |
| Do | do | Dec. 5, 1924 | do | do | Dec. 7, 1924 | | 771 |
| Do | do | Dec. 12, 1924 | do | do | Dec. 16, 1924 | | 771 |
| Do | do | Dec. 31, 1924 | do | do | Jan. 6, 1925 | | 692 |
| Do | do | Jan. 23, 1925 | do | do | Jan. 27, 1925 | | 692 |
| Do | do | Feb. 6, 1925 | do | do | Feb. 10, 1925 | | 692 |
| Do | do | Feb. 11, 1925 | San Francisco, Calif. | do | Mar. 10, 1925 | 664 | 9,333 |
| Do | do | Mar. 13, 1925 | Albany and Lyon Mountain, N. Y. | do | Mar. 17, 1925 | | 771 |
| Do | do | Mar. 20, 1925 | do | do | Mar. 24, 1925 | | 771 |
| Do | do | Mar. 27, 1925 | do | do | Mar. 30, 1925 | | 692 |
| Do | do | Apr. 15, 1925 | Washington, D. C. | do | Apr. 15, 1925 | | 480 |
| Do | do | Apr. 16, 1925 | Albany and Lyon Mountain, N. Y. | do | Apr. 21, 1925 | | 692 |
| Do | do | Apr. 21, 1925 | do | do | Apr. 27, 1925 | | 692 |
| Do | do | Apr. 30, 1925 | do | do | May 6, 1925 | | 692 |
| D. & H. report: | | | | | | | |
| D. & H. 500 | Albany, N. Y. | May 14, 1925 | Lyon Mountain, N. Y. | do | May 19, 1925 | 402 | 430 |
| Wabash report: | | | | | | | |
| Wab. 400 | New York, N. Y. | May 29, 1925 | Albany and Lyon Mountain, N. Y. | do | June 2, 1925 | | 692 |
| Do | do | June 4, 1925 | Washington, D. C. | do | June 5, 1925 | | 480 |
| Do | do | June 5, 1925 | Albany and Lyon Mountain, N. Y. | do | June 9, 1925 | | 692 |
| Do | do | June 11, 1925 | do | do | June 16, 1925 | | 692 |
| Do | do | June 18, 1925 | do | do | June 23, 1925 | | 692 |
| Do | do | June 24, 1925 | do | do | June 29, 1925 | | 692 |
| Do | do | July 1, 1925 | do | do | July 6, 1925 | | 692 |
| Do | do | July 24, 1925 | Albany and Plattsburg, N. Y. | do | July 28, 1925 | | 674 |
| Do | do | July 29, 1925 | Albany and Lyon Mountain, N. Y. | do | Aug. 1, 1925 | | 692 |
| Do | do | Aug. 6, 1925 | do | do | Aug. 11, 1925 | | 692 |
| Do | do | Aug. 12, 1925 | do | do | Aug. 13, 1925 | | 692 |
| Do | do | Sept. 2, 1925 | do | do | Sept. 8, 1925 | | 692 |
| Do | do | Sept. 10, 1925 | San Francisco, Calif. | do | Oct. 5, 1925 | | 7,193 |
| D. & H. report: | | | | | | | |
| D. & H. 500 | Albany, N. Y. | Sept. 17, 1925 | New York and Lyon Mountain, N. Y. | Washington, D. C., and Albany, N. Y. | Sept. 27, 1925 | 800 | 1,319 |
| Wabash report: | | | | | | | |
| Wab. 400 | New York, N. Y. | Oct. 8, 1925 | Albany and Lyon Mountain, N. Y. | New York, N. Y. | Oct. 13, 1925 | | 692 |
| Do | do | Oct. 13, 1925 | Pittsburgh, Pa. | do | Oct. 16, 1925 | | 1,447 |
| Do | do | Nov. 5, 1925 | Albany and Lyon Mountain, N. Y. | do | Nov. 8, 1925 | | 692 |
| Do | do | Nov. 13, 1925 | do | do | Nov. 15, 1925 | | 771 |
| Do | do | Nov. 20, 1925 | Boston, Mass. | do | Nov. 23, 1925 | | 476 |
| D. & H. report: | | | | | | | |
| D. & H. 500 | Albany, N. Y. | Nov. 24, 1925 | New York and Lyon Mountain, N. Y. | Albany, N. Y. | Dec. 2, 1925 | 266 | 415 |
| Wabash report: | | | | | | | |
| Wab. 400 | New York, N. Y. | Dec. 11, 1925 | Albany and Lyon Mountain, N. Y. | New York, N. Y. | Dec. 15, 1925 | | 771 |

[1] Lyon Mountain is a resort in the Adirondacks.

[2] This movement also included other destinations.

## APPENDIX E

*Statement covering private cars of the Nickel Plate*

| Number of car | Old number or date car was built for Nickel Plate | To whom assigned and periods of assignment | Periods cars on lines (months) | Trips exclusively on home line | | Home-line portion of trips on home and foreign lines (miles) | Total mileage of home cars on home lines | | Foreign line portion of trips on home and foreign lines | | Total mileage of home cars on home and foreign lines | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Miles | Miles per car-month | | Miles | Miles per car-month | Miles [1] | Miles per car-month | Miles | Miles per car-month |
| 21 | T. S. L. & W. 60 | General superintendent, Frankfort, Ind., Jan. 1, 1923, to Dec. 31, 1925. | 36 | 61,672 | 1,713 | 414 | 62,086 | 1,725 | 426 | 12 | 62,512 | 1,736 |
| 22 | T. S. L. & W. 400 | Senior vice president, Toledo, Ohio, Jan. 1, 1923, to Dec. 31, 1925. | 36 | 13,942 | 387 | 7,837 | 21,779 | 605 | *31,586* | 877 | 53,365 | 1,482 |
| 23 | L. E. W. 69 | General superintendent, Jan. 1, 1923, to Dec. 31, 1925; chief engineer, Jan. 1, 1923, to Sept. 16, 1924; district engineer, Sept. 16, 1924, to June 1, 1925; district engineer, June 1, 1925, to Dec. 31, 1923, Indianapolis, Ind. | 36 | 57,898 | 1,608 | 2,816 | 60,714 | 1,687 | 2,717 | 75 | 63,431 | 1,762 |
| 24 | L. E. W. 100 | General manager, Jan. 1, 1923, to Feb. 14, 1923; no assignment, Feb. 14, 1923, to Dec. 31, 1924; vice president and general manager, Dec. 31, 1924, to Feb. 5, 1925; assistant general manager, Feb. 5, 1925, to Dec. 31, 1925, Indianapolis, to Feb. 14, 1923, Cleveland, subsequently. | 36 | 42,427 | 1,179 | 8,104 | 50,531 | 1,404 | 43,891 | 1,219 | 94,422 | 2,623 |
| 25 | | President, Jan. 1, 1923, to Feb. 5, 1925; vice president and general manager, Feb. 5, 1925, to Dec. 31, 1925, Cleveland, Ohio. | 36 | 45,312 | 1,259 | 10,218 | 55,530 | 1,543 | *59,597* | 1,655 | 115,127 | 3,198 |
| 26 | | Vice president and general manager Jan. 1, 1923, to Dec. 31, 1924; superintendent motive power, Jan. 1, 1925, to Dec. 31, 1925; general superintendent, Jan. 1, 1925, to Apr. 3, 1925; general superintendent, Apr. 11, 1925, to Dec. 31, 1925; chief engineer, Jan. 1, 1925, to May 18, 1925; chief engineer, June 1, 1925, to Dec. 31, 1925, Cleveland, Ohio. | 36 | 89,267 | 2,480 | 6,525 | 95,792 | 2,661 | 11,363 | 317 | 107,155 | 2,977 |
| 27 | Built Feb., 1925 | Chairman, Feb. 5, 1925, to Dec. 31, 1925, Cleveland, Ohio | 11 | 3,301 | 300 | 96 | 3,397 | 309 | *30,732* | *2,794* | 34,129 | 3,082 |
| 28 | Built as No. 27, May, 1923, restenciled No. 28, Jan. 13, 1925. | Chairman, May 16, 1923, to Feb. 5, 1925; president, Feb. 5, 1925, to Dec. 31, 1925, Cleveland, Ohio. | 32 | 23,757 | 742 | 4,612 | 28,369 | 887 | *74,692* | *2,331* | 102,971 | 3,218 |

[1] Note the heavy foreign-line mileage of cars 22, 25, 27, and 28 (italic) and the comparatively heavy average miles per car-month of the two latter cars on foreign lines.

## APPENDIX F

*Statement showing movement of the Louisiana & Pacific (Long-Bell Lumber Corporation) private cars over the Union Pacific Railroad*

| Car initial and number | Date | From— | To— | Occupants of car (exclusive of car crew) | Transportation | Total mileage on U. P. R. R. |
|---|---|---|---|---|---|---|
| L. & P. Kymokan 100 | Apr. 21, 1923 | Kelso, Wash | Portland, Oreg | Vice president, S. A. & S. W<br>Secretary to vice president<br>Assistant to vice president | Pass<br>Ticket<br>do | 48 |
| Do | May 23, 1923 | Portland, Oreg | Kelso, Wash | Vice president, S. A. & S. W<br>Secretary to vice president<br>Assistant to vice president<br>Superintendent, Long Bell Lbr. Mills | Pass<br>Ticket<br>do<br>do | 48 |
| Do | June 19, 1923 | Omaha, Nebr | Portland, Oreg., and Kansas City, Mo. | Vice president, S. A. & S. W<br>Two children of vice president<br>Four relatives of vice president<br>Secretary to vice president | Passes<br>do<br>Tickets<br>Ticket | 3,790 |
| Do | July 11, 1923 | Portland, Oreg | Kansas City, Mo | Vice president, S. A. & S. W<br>Manager of Longview Farm and wife<br>Grandson of president<br>Two maids<br>Assistant to vice president and wife | Pass<br>Tickets<br>Ticket<br>Tickets<br>do | 2,110 |
| L. & P. 101 | Sept. 11, 1924 | Longview Junction, Wash | Portland, Oreg | Vice president, S. A. & S. W<br>Employee | Pass<br>do | 45 |
| Do | Nov. 15, 1924 | Denver, Colo | Ogden, Utah | Vice president, S. A. & S. W<br>Two employees | Pass<br>Passes | 589 |
| L. P. & N. 101 | Feb. 1, 1924 | Omaha, Nebr | Portland, Oreg | Vice president, S. A. & S. W<br>Chairman, S. A. & S. W., and wife<br>Valet to chairman<br>Assistant to vice president<br>Chief clerk, Long Bell Lbr. Co | Pass<br>Passes<br>Pass<br>Ticket<br>do | 1,775 |
| Do | May 7, 1924 | Longview Junction, Wash | Portland, Oreg | Vice president, S. A. & S. W<br>General manager, Long Bell Lbr. Co<br>Superintendent, Long Bell Lbr. Co<br>Manager of stores, Long Bell Lbr. Co | Pass<br>Ticket<br>do<br>do | 45 |
| Do | May 19, 1924 | Ogden, Utah | Omaha, Nebr | Vice president, S. A. & S. W<br>Four employees | Pass<br>Passes | 990 |
| Do | June 7, 1924 | Omaha, Nebr | Portland, Oreg | Vice president, S. A. & S. W<br>Two children of vice president<br>Friend of vice president's son<br>Father of vice president<br>Secretary to vice president<br>Assistant to vice president<br>Family of cook on car | do<br>do<br>Ticket<br>do<br>do<br>do<br>Passes | 1,773 |

*Statement showing movement of the Louisiana & Pacific (Long-Bell Lumber Corporation) private cars over the Union Pacific Railroad*—Contd.

| Car initial and number | Date | From— | To— | Occupants of car (exclusive of car crew) | Transportation | Total mileage on U. P. R. R. |
|---|---|---|---|---|---|---|
| L. P. & N. 101 | Jan. 1, 1925 | Portland, Oreg. | Omaha, Nebr. | Vice president, S. A. & S. W.<br>Wife and two children of vice president | Pass<br>Passes | 1,782 |
| Do. | Jan. 18, 1925 | Kansas City, Mo. | Portland, Oreg. | Vice president and general manager, S. A. & S. W.<br>Wife of chairman, S. A. & S. W.<br>Daughter of chairman<br>Maid of chairman's wife | Pass<br>do<br>Ticket<br>Pass | 2,013 |
| Do. | Feb. 2, 1925 | Longview Junction, Wash. | Portland, Oreg. | | | 45 |
| Do. | Apr. 9, 1925 | Portland, Oreg. | Omaha, Nebr. | Chairman, S. A. & S. W.<br>President, S. A. & S. W., and wife<br>Treasurer, Long Bell Lbr. Co.<br>Sister of president's wife<br>Valet to chairman<br>Vice president and general manager | Pass<br>Passes<br>Ticket<br>do<br>Pass<br>do | 1,732 |
| Do. | June 11, 1925 | Omaha, Nebr. | Portland, Oreg. | Vice president, S. A. & S. W.<br>Wife and two children of vice president<br>Assistant to vice president<br>Grandmother of vice president<br>Secretary to vice president<br>Friend of son of vice president<br>Father of vice president | do<br>Passes<br>Pass<br>Ticket<br>do<br>do<br>do | 1,772 |
| Do. | June 14, 1925 | Portland, Oreg. | Omaha, Nebr. | Deadhead | | 1,782 |
| Do. | July 17, 1925 | Omaha, Nebr. | Ogden, Utah | Vice president and general manager, S. A. & S. W. and wife.<br>Valet to vice president<br>Maid to vice president's wife | Passes<br>Pass<br>do | 990 |
| Do. | Aug. 28, 1925 | Portland, Oreg. | Omaha, Nebr. | Vice president and general manager, S. A. & S. W.<br>Valet to vice president<br>Maid to vice president's wife<br>Two passengers | Passes<br>Pass<br>do<br>Tickets | 1,782 |
| Do. | Sept. 12, 1925 | Kansas City, Mo. | Portland, Oreg., and Omaha, Nebr. | Vice president, S. A. & S. W.<br>Assistant to vice president and wife<br>Treasurer, Long Bell Lbr. Co., and wife<br>Maid | Pass<br>Passes<br>Tickets<br>Ticket | 3,795 |

## APPENDIX G

*Statement showing movement of Nevada Northern private cars on Western Pacific, Southern Pacific, and Union Pacific*

| Car [1] | Date | From— | To— | Occupants | Mileage |
|---|---|---|---|---|---|
| On Western Pacific: [2] | | | | | |
| No. 101 | Jan. 1, 1923 | Salt Lake, Utah | Shafter, Nev | General manager, N. N. | 162 |
| Do | Feb. 1, 1923 | Shafter, Nev | Salt Lake, Utah | Deadhead | 162 |
| Do | Feb. 7, 1923 | Salt Lake, Utah | Shafter, Nev | General manager, N. N. | 162 |
| Do | June 6, 1923 | Shafter, Nev | Salt Lake, Utah | do | 162 |
| Do | Sept. 26, 1923 | do | Oakland, Calif | General manager, N. N., and wife. | 762 |
| Do | July 11, 1923 | do | Salt Lake, Utah | General manager, N. N. | 324 |
| Do | June 14, 1923 | do | do | General manager, N. N., and wife; wife of M. M. S. P.; wife of chief surgeon, N. N. | 762 |
| Do | Oct. 18, 1923 | do | do | General manager, N. N. | 162 |
| Do | Nov. 6, 1923 | Salt Lake, Utah | Shafter, Nev | do | 162 |
| Do | Mar. 17, 1924 | Shafter, Nev | Salt Lake, Utah | General manager, N. N., and wife; traffic manager, N. N., and wife. | 324 |
| Cyprus | Mar. 27, 1924 | Oakland, Calif | Shafter, Nev | Vice president, N. N., and wife. | 762 |
| Do | Mar. 21, 1924 | Shafter, Nev | Salt Lake, Utah | do | 162 |
| Do | Aug. 5, 1924 | do | do | do | 162 |
| Do | Aug. 16, 1924 | Alazon, Nev | Oakland, Calif | do | 713 |
| No. 101 | Feb. 14, 1925 | Shafter, Nev | Salt Lake, Utah | General manager, N. N. | 162 |
| Do | Mar. 6, 1925 | Salt Lake, Utah | Shafter, Nev | Vice president, N. N. | 162 |
| Do | May 19, 1925 | Shafter, Nev | Oakland, Calif | General manager, N. N., and wife. | 762 |
| Do | June 28, 1925 | do | Salt Lake, Utah | do | 162 |
| Do | July 2, 1925 | Salt Lake, Utah | Shafter, Nev | General manager, N. N. | 162 |
| Do | Aug. 11, 1925 | Alazon, Nev | Oakland, Calif | do | 713 |
| Do | Nov. 22, 1925 | Shafter, Nev | Salt Lake, Utah | do | 162 |
| Total miles | | | | | 7,228 |
| On Southern Pacific: [3] | | | | | |
| No. 101 | Jan. 2, 1923 | Cobre, Nev | Ogden, Utah | General manager, N. N. | 137 |
| Do | Feb. 20, 1923 | do | San Francisco, Calif.; Maricopa, Ariz. | Vice president, C. R. & N. W. | 1,619 |
| Cyprus | (?) | Oakland Pier, Calif. | Cobre, Nev | Vice president, N. N. | 641 |
| No. 101 | Mar. 6, 1923 | Maricopa, Ariz | San Francisco, Calif.; Cobre, Nev. | Vice president, C. R. & N. W. | 1,620 |
| Cyprus | May 10, 1923 | Deming, N. Mex. | Maricopa, Ariz | Vice president, N. N. | 310 |
| Do | May 13, 1923 | Maricopa, Ariz | Oakland Pier, Calif | do | 897 |
| No. 100 | May 25, 1923 | Ogden, Utah | Cobre, Nev | President, C. R. & N. W. | 138 |
| Do | May 27, 1923 | Cobre, Nev | Ogden, Utah | do | 137 |
| No. 101 | June 15, 1923 | Oakland, Calif | Cobre, Nev | General manager, N. N. | 641 |
| Cyprus | Aug. 15, 1923 | Ogden, Utah | Oakland Pier, Calif.; Sacramento, Calif.; Oakland Pier, Calif. | Vice president, N. N. | 1,727 |
| No. 100 | Aug. 4, 1923 | Portland, Oreg | Merced, Calif | President, N. N. | 914 |
| Do | Aug. 9, 1923 | Merced, Calif | Ogden, Utah | do | 808 |
| Cyprus | do | Oakland, Calif | do | Vice president, N. N. | 778 |
| No. 100 | Oct. 18, 1923 | Ogden, Utah | Cobre, Nev | President, C. R. & N. W. | 138 |
| Do | Oct. 20, 1923 | Cobre, Nev | Ogden, Utah | do | 137 |
| Cyprus | Nov. 19, 1923 | Deming, N. Mex | Los Angeles, Calif. | Vice president, N. N. (for repairs). | 1,440 |
| Do | Dec. 2, 1923 | do | Maricopa, Ariz | Vice president, N. N. | 310 |

[1] Car Cyprus is privately owned by a vice president of the Nevada Northern.
[2] Trips made on Western Pacific by Nevada Northern cars 100, 101, and Cyprus during 1923, 1924, and 1925.
[3] Trips made on Southern Pacific by Nevada Northern cars 100, 101, and Cyprus.

*Statement showing movement of Nevada Northern private cars on Western Pacific, Southern Pacific, and Union Pacific*—Continued

| Car | Date | From— | To— | Occupants | Mileage |
|---|---|---|---|---|---|
| On Southern Pacific—Con. | | | | | |
| Cyprus | Dec. 5, 1923 | Maricopa, Ariz. | San Francisco, Calif.; Oakland, Calif. | Vice president, N. N. | 979 |
| No. 101 | Jan. 21, 1924 | Cobre, Nev. | Oakland Pier, Calif. | General manager, N. N. | 1,282 |
| Cyprus | do | Oakland Pier, Calif. | Ogden, Utah | Vice president, N. N. | 778 |
| Do | Mar. 15, 1924 | Ogden, Utah | Oakland Pier, Calif. | do | 779 |
| Do | May 7, 1924 | Deming, N. Mex. | Maricopa, Ariz. | do | 310 |
| Do | May 10, 1924 | Maricopa, Ariz. | Oakland Pier, Calif.; Sacramento, Calif. | do | 995 |
| Do | do | Sacramento, Calif. | Oakland Pier, Calif. | Unoccupied | 85 |
| No. 101 | June 6, 1924 | Cobre, Nev. | do | General manager, N. N. | 1,282 |
| Do | July 6, 1924 | do | Reno, Nev. | do | 401 |
| Cyprus | June 4, 1924 | Oakland Pier, Calif. | Cobre, Nev. | Vice president, N. N. | 636 |
| Do | Aug. 15, 1924 | Ogden, Utah | Alazon, Nev. | do | 180 |
| Cyprus | Aug. 22, 1924 | Oakland, Calif. | Ogden, Utah | Vice president, N. N. | 773 |
| No. 101 | Sept. 27, 1924 | Cobre, Nev. | Oakland Pier, Calif. | General manager, N. N. | 1,277 |
| No. 100 C. R. & N. W. | Nov. 22, 1924 | Los Angeles, Calif. | El Paso, Tex. | Treasurer, C. R. & N. W. | 853 |
| Do | Dec. 11, 1924 | Ogden, Utah | Cobre, Nev. | President, C. R. & N. W. | 139 |
| Do | Dec. 12, 1924 | Cobre, Nev. | Ogden, Utah | do | 138 |
| Do | Dec. 24, 1924 | Ogden, Utah | Oakland Pier, Calif. | do | 1,521 |
| Cyprus | Dec. 3, 1924 | El Paso, Tex. | Ray Junction, Ariz.; Oakland Pier, Calif. | Vice president, N. N. | 1,528 |
| No. 100 C. R. & N. W. | Feb. 11, 1925 | Tucumcari, N. Mex. | El Centro, Calif. | President, C. R. & N. W. | 965 |
| No. 101 | Feb. 17, 1925 | Los Angeles, Calif. | Nogales, Ariz. | General manager, N. N. | 369 |
| Do | Feb. 28, 1925 | Nogales, Ariz. | Los Angeles, Calif. | do | 369 |
| Cyprus | (?) | Oakland Pier, Calif. | Ogden, Utah | Vice president, N. N. | 773 |
| Do | Mar. 23, 1925 | do | do | do | 773 |
| Do | May 4, 1925 | Deming, N. Mex. | Ray Junction, Ariz. | do | 491 |
| Do | May 10, 1925 | Los Angeles, Calif. | Oakland Pier, Calif. | do | 497 |
| No. 101 | May 20, 1925 | Oakland, Calif. | Cobre, Nev. | General manager, N. N. | 638 |
| Cyprus | July 10, 1925 | Oakland Pier, Calif. | Deming, N. Mex.; Winkleman, Ariz.; Phoenix, Ariz.; Ray Junction, Ariz; San Francisco, Calif.; Portland, Oreg. | Vice president, N. N. | 3,656 |
| Do | Aug. 22, 1925 | Ogden, Utah | Oakland Pier, Calif. | do | 779 |
| No. 101 | Aug. 19, 1925 | Oakland, Calif. | Cobre, Nev. | General manager, N. N. | 636 |
| Cyprus | Aug. 15, 1925 | Cobre, Nev. | Wells, Nev. | Vice president, N. N. | 47 |
| Do | (?) | Oakland Pier, Calif. | Ogden, Utah | do | 773 |
| Do | Nov. 5, 1925 | Phoenix, Ariz. | Ray Junction, Ariz. | do | 499 |
| Do | Nov. 8, 1925 | Deming, N. Mex. | Tucumcari, N. Mex. | do | 420 |
| Do | Dec. 1, 1925 | Ogden, Utah | Oakland Pier, Calif.; San Jose, Calif.; Oakland Pier, Calif. | do | 965 |
| | | | | | [4] 35,760 |

[4] Total mileage, not including 3,616 miles by C. R. & N. W. car No. 101.

*Trips made on Union Pacific by Nevada Northern private cars*

| Car | Movement | Occupants |
|---|---|---|
| N. N. 100 | Ogden, Utah, to Los Angeles, Calif., Aug. 13, 1923, mileage 1,708. | President, N. N., and wife, passes; president's daughter, pass; secretary to president, pass; two guests, tickets; two maids, tickets; valet, ticket. |
| Do | Council Bluffs, Iowa, to Salt Lake City, Utah, May 21, 1923, mileage 1,065. | President, C. R. & N. W., pass; vice president and general manager, C. R. & N. W., pass; another vice president, C. R. & N. W. pass; secretary to president, pass. |
| Do | Ogden, Utah, to Council Bluffs, Iowa, May 28, 1923, 993 miles. | President, C. R. & N. W., pass; vice president, C. R. & N. W., pass; secretary to president, pass. |
| Do | Butte, Mont., to Salt Lake City, Utah, Oct. 16, 1923, mileage 469. | President, C. R. & N. W., pass; two employees of N. N., passes. |
| Do | Ogden, Utah, to Omaha, Nebr., Oct. 21, 1923, mileage 990. | President, C. R. & N. W., pass; vice president and general manager, C. R. & N. W., pass; secretary to president, pass. |
| N. N. Ely 101 | Ogden, Utah, to Omaha, Nebr., Jan. 3, 1923, mileage 990. | General manager, N. N., and wife, passes; daughter of general manager, pass; nurse, pass. |
| Do | Omaha, Nebr., to Salt Lake City, Utah, Jan. 9, 1923, mileage 1,026. | General manager, N. N., and crew (cook and porter), passes. |
| Do | Salt Lake City, Utah, to Council Bluffs, Iowa, Feb. 2, 1923, mileage 2,058. | General manager, N. N., and wife, daughter, and crew, passes. |
| Do | Salt Lake City, Utah, to Los Angeles, Calif., Oct. 19, 1923, mileage 784. | General manager, N. N., and wife, passes; chief surgeon, N. N., and wife, passes; storekeeper, pass. |
| Do | Los Angeles, Calif., to Salt Lake City, Utah, Nov. 4, 1923, mileage 784. | |
| N. N. Cyprus | Salt Lake City, Utah, to Ogden, Nev., Mar. 24, 1923, mileage 433. | Vice president, N. N., and wife, passes; maid, pass; secretary to vice president, pass. |
| Do | Salt Lake City to Ogden, Utah, Aug. 13, 1923, mileage 36. | Vice president, N. N., pass; secretary to vice president, pass. |
| Do | Ogden, Utah, to Butte, Mont., via Salt Lake City, Utah, Oct. 2, 1923, mileage 469. | Vice president, N. N., and wife, passes; maid, pass; secretary, pass; vice president and general manager, B. & G., pass; assistant general manager, Utah Copper Co., ticket. |
| Do | Salt Lake City to Ogden, Utah, Aug. 6, 1924, mileage 1,044. | President, B. & G., pass; secretary, pass; vice president, B. & G., pass; doctor, ticket; passenger, ticket. |
| Do | Ogden, Utah, to Omaha, Nebr., Oct. 9, 1924, mileage 1,062. | President, B. & G., and wife, passes; secretary and maid, passes. |
| Do | Omaha, Nebr., to Ogden, Utah, Mar. 14, 1924, mileage 990. | President, B. & G., and secretary, passes. |
| Do | Ogden, Utah, to Omaha, Nebr., Mar. 2, 1925, mileage 990. | President, B. & G., and secretary, passes. |
| Do | Butte, Mont., to Salt Lake City, Utah, Mar. 17, 1925, mileage 433. | Do. |
| Do | Ogden, Utah, to Omaha, Nebr., Apr. 2, 1925, mileage 990. | President, B. & G., wife, maid, and secretary, passes. |
| Do | Butte, Mont., to Salt Lake City, Utah, Aug. 11, 1925, mileage 433. | President, B. & G., and secretary, passes. |
| Do | Salt Lake City to Ogden, Utah, Aug. 18, 1925, mileage 578. | President, B. & G., and secretary, passes. |
| Do | Ogden, Utah, to Omaha, Nebr., Sept. 30, 1925, mileage 1,062. | President, B. & G., wife, secretary, and maid, passes; guest, ticket. |
| Do | Omaha, Nebr., to Ogden, Utah, Nov. 30, 1925, mileage 990. | President, B. & G., and secretary, passes. |
| N. N. 100 | Council Bluffs, Iowa, to Salt Lake City, Utah, Aug. 7, 1925, mileage 2,946. Trude, Idaho; Pocatello, Idaho. | President, N. N., pass; five passengers, tickets; valet, ticket; secretary, ticket. |
| N. N. 101 | Salt Lake City, Utah, to Los Angeles, Calif., Feb. 14, 1925, mileage 784. | General manager, N. N., and wife, passes; secretary, pass; chief surgeon, N. N., and wife, passes. |
| Do | Los Angeles, Calif., to Salt Lake City, Utah, Mar. 4, 1925, mileage 784. | Do. |
| Do | Salt Lake City, Utah, to Payette, Idaho, and return, June 29, 1925, mileage 940. | General manager, N. N., and wife, passes. |

## APPENDIX H

*Statement showing movement of Pullman cars occupied by railway officials and others and transported free or at less than published tariff rates*

### ON UNION PACIFIC RAILROAD

| Name of car | Movement | Occupants |
|---|---|---|
| National | Omaha, Nebr., to Ogden, Utah, Mar. 10, 1923, mileage 990. | Cook and porter. |
| Do | Ogden, Utah, to Omaha, Nebr., Mar. 13, 1923, mileage 990. | Director of M. P. R. R., pass; two nurses, passes; four passengers, tickets. |
| Do | Omaha, Nebr., to Ogden, Utah, Aug. 31, 1923, mileage 990. | Waiter, cook, and porter. |
| Do | Ogden, Utah, to Omaha, Nebr., Sept. 5, 1923, mileage 990. | Director of M. P. R. R., and wife, passes; three passengers, tickets. |
| Pioneer | Omaha, Nebr., to Ogden, Utah, Jan. 20, 1923, mileage 990. | Director of S. P. Co., pass; valet to director, pass; relative of director, her secretary, maid, and man servant, tickets. |
| Do | Ogden, Utah, to Omaha, Nebr., Jan. 23, 1923, mileage 990. | Director of S. P. Co., pass; valet, pass; relative of director, her secretary, maid, man servant, and laundress, tickets. |
| Do | Ogden, Utah, to Omaha, Nebr., Mar. 10, 1923, mileage 990. | Director of S. P. Co., pass; director's valet, pass; director's relative, her secretary and servants, tickets. |
| Boston | Omaha, Nebr., to Ogden, Utah, Mar. 2, 1924, mileage 990. | Director of S. P. Co., pass; director's valet, pass; director's relative, her secretary, and three maids, tickets. |
| Do | Ogden, Utah, to Omaha, Nebr., Mar. 8, 1924, mileage 990. | Do. |
| Do | Omaha, Nebr., to Los Angeles, Calif., July 29, 1924, mileage 1,810. | Car crew. |
| Do | Butte, Mont., to Omaha, Nebr., Aug. 27, 1924, mileage 1,681. | President of T. & W. Ry., wife and daughter, passes; two passengers, tickets. |
| Chicago | Omaha to Portland, Oreg., Mar. 17, 1924, via Denver, mileage 2,229. | President of T. & W. Ry., and wife, passes; secretary to president, ticket; two passengers, tickets; maid and valet, passes. |
| Advance | Portland, Oreg., to Omaha, Nebr., July 8, 1925, mileage 1,994. | Assistant to president of N. P., pass; personal physician of assistant to president, and wife, tickets; four Government officials, tickets. |
| Philadelphia | Omaha, Nebr., to Ogden, Utah, July 17, 1925, mileage 990. | Director of S. P., pass; valet, pass; relative of director, her secretary, and three servants, tickets. |
| Do | Ogden, Utah, to Omaha, Nebr., Jan. 21, 1925, mileage 990. | Do. |
| Washington | Omaha, Nebr., to Seattle, Wash., Apr. 7, 1925, mileage 1,970. | Director U. P. R. R., pass; three passengers, tickets. |

### ON NEW YORK CENTRAL RAILROAD

| Pullman car | Date | Occupants |
|---|---|---|
| Pioneer | Jan. 17, 1923 | Director, N. Y. C., and party. |
| Do | Mar. 12, 1923 | Do. |
| Boston | Apr. 30, 1923 | Wife of president, N. Y. C. |
| Chicago | June 11, 1923 | President, R. L. Trans. Co. |
| Republic | Aug. 26, 1923 | Do. |
| National | Sept. 7, 1923 | Director. |
| Boston | Oct. 15, 1923 | President, Magma Arizona R. R. |
| Chicago | Oct. 15, 1923 | President, R. L. Trans. Co. |
| Do | Oct. 17, 1923 | Do. |
| Adventurer | Nov. 1, 1923 | Director, Mo. Pac. |
| Do | Nov. 5, 1923 | Do. |
| Newport | Nov. 1, 1923 | Director, A., T. & S. F. |
| Do | Nov. 5, 1923 | Do. |
| Washington | Jan. 15, 1924 | Director, N. Y. C., and party. |
| Boston | Mar. 10, 1924 | Do. |
| Colonial | Apr. 17, 1924 | Vice president and treasurer, C. R. & N. W., and party. |
| Newport | Apr. 22, 1924 | President, Magma Arizona R. R. |
| Constitution | Apr. 27, 1924 | Director, L. A. & S. L. |
| Do | Apr. 30, 1924 | Do. |
| Superb | June 14, 1924 | Director, Vgn. Ry., and party. |
| Pioneer | July 2, 1924 | Chairman, Union Stock & Transit Co., and party. |
| Do | Aug. 28, 1924 | Do. |
| Adventurer | Oct. 13, 1924 | President, R. L. Trans. Co., and party. |
| Do | Oct. 17, 1924 | Do. |

*Statement showing movement of Pullman cars occupied by railway officials and others and transported free or at less than published tariff rates*—Continued

ON NEW YORK CENTRAL RAILROAD—continued

| Pullman car | Date | Occupants |
|---|---|---|
| Superb | Oct. 23, 1924 | Director, Mo. Pac. |
| Do | Oct. 26, 1924 | Do. |
| Colonial | Oct. 7, 1924 | Director, Virginian. |
| Do | Oct. 8, 1924 | Do. |
| Philadelphia | Jan. 15, 1925 | Director, N. Y. C., and party. |
| Ideal | Jan. 9, 1925 | Vice President, Mo. Pac., and wife. |
| Do | Jan. 10, 1925 | Do. |
| Chicago | June 12, 1925 | Director, L. A. & S. L., and party. |
| Patriot | Oct. 22, 1925 | Director, Mo. Pac., and party. |
| Clysma | Oct. 26, 1925 | Do. |
| National | Oct. 19, 1925 | President, R. L. Trans. Co., and party. |
| Do | Oct. 21, 1925 | Do. |
| New York | Nov. 20, 1925 | President, Toledo & Western, and party. |
| Do | Nov. 22, 1925 | Do. |
| Ideal | Nov. 30, 1925 | President, R. L. Trans. Co. |
| Other than those listed were: | | |
| Boston | | Director, N. P. and president, W. F. Exp. |
| Philadelphia | | President, Chicago, North Shore & Milwaukee. |
| Pioneer | | Director, Virginian. |
| Palm Beach | | Do. |
| Colonial | | Passenger traffic manager, Nor. Pac. |
| Commonwealth | | Chairman of board, Reading. |
| Washington | | President, Tremont & Gulf. |
| Do | | Director, U. P. R. R. |
| Chicago | | Vice president, N. O. G. N. |
| Patriot | | General counsel, W. Va. No. |
| Columbia | | President, Waycross & Georgia. |
| Mayflower | | Director, Wabash Ry. |
| Constitution | | President, Virginian. |
| New York | | Treasurer, Durham & Southern. |

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
*Secretary.*

[fol. 171] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—July 12, 1930

The petitioners in the above entitled suit, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled suit by the District Court of the United States for the Western District of Kentucky on the 13th day of June, 1930, and from each and every part thereof, and having presented their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the Western District of Kentucky in this cause as provided by law, and it is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within 30 days from this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.00.

Chas. I. Dawson, Judge of the District Court for the Western District of Kentucky; Chas. H. Moorman, Judge of the United States Court of Appeals for the Sixth Circuit; Smith Hickenlooper, Judge of the United States Court of Appeals for the Sixth Circuit.

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[fol. 172] IN UNITED STATES DISTRICT COURT

ORDER FILING APPEAL PAPERS—July 12, 1930

Came the Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Com-

pany, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by counsel, and tendered their notice of appeal, petition for appeal therein, assignment of errors and statement of the evidence condensed as required by Equity Rule 75, all of which are ordered to be filed.

Chas. H. Moorman, Circuit Judge; Smith Hickenlooper, Circuit Judge; Chas. I. Dawson, District Judge.

[fol. 173] Citation in usual form showing service on Elmer B. Collins and J. Stanley Payne, omitted in printing.
[fol. 174] Bond on appeal for $500.00 approved and filed July 24, 1930, omitted in printing.

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[fol. 175] In United States District Court

Præcipe for Record—Filed July 25, 1930

To the Clerk:

Please prepare a transcript of the record in the above case on appeal to the Supreme Court of the United States containing the following:

(1) Petition, including all exhibits thereto attached.
(2) Answer of the United States.
(3) Answer of the Commission, including exhibits thereto attached.
(4) Stipulation read into the record on the hearing of the case, December 20, 1929, by Mr. Knowlton, Counsel for the Commission, and agreed to by all the counsel in the case.
(5) Condensed statement of the evidence.
(6) All orders of the District Court in their appropriate order.
(7) Opinion of the Court.
(8) Final Decree.
(9) Notice of Appeal to the Attorney General of Kentucky and proof or acknowledgment of service.
(10) Petition for Appeal and Assignment of Errors.
(11) Acknowledgment of service thereof.
(12) Order allowing appeal.

[fol. 177]

| Railroad | Year | Number of private cars | Home Cars on Home Railroad — Transportation: Trips | Occupants | Pass | Ticket | Home Cars on Home and Foreign Railroads — Transportation: Trips | Occupants | Pass | Ticket | Foreign Cars on Home Railroad — Transportation: Trips | Occupants | Pass | Ticket |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Baltimore & Ohio RR Co. | 1923 | 20 | 493 | 1378 | 1368 | 10 | 105 | 331 | 311 | 20 | 197 | 504 | 442 | 62 |
| | 1924 | 20 | 490 | 1380 | 1372 | 8 | 117 | 380 | 343 | 37 | 173 | 445 | 393 | 52 |
| | 1925 | 20 | 493 | 1362 | 1341 | 21 | 119 | 365 | 345 | 20 | 193 | 509 | 460 | 49 |
| Chesapeake & Ohio Ry. | 1923 | 8 | 224 | 455 | 453 | 2 | 46 | 135 | 135 | | 97 | 169 | 159 | 10 |
| | 1924 | 9 | 251 | 549 | 547 | 2 | 79 | 214 | 214 | | 90 | 145 | 128 | 17 |
| | 1925 | 9 | 243 | 607 | 597 | 10 | 105 | 198 | 195 | 3 | 114 | 227 | 185 | 42 |
| Cleveland, Cincinnati, Chicago & St. Louis RR * | 1923 | 6 | 399 | 751 | 749 | 2 | 46 | 92 | 90 | 2 | 237 | 345 | 345 | |
| | 1924 | 6 | 458 | 855 | 853 | 2 | 56 | 109 | 109 | | 252 | 392 | 392 | |
| | 1925 | 6 | 538 | 1010 | 1009 | 1 | 86 | 153 | 152 | 1 | 313 | 421 | 421 | |
| (Illinois Central R. R. | 1923 | 19 | 403 | 1030 | 1012 | 18 | 92 | 242 | 227 | 15 | 179 | 262 | 255 | 7 |
| (Yazoo & Miss. Valley Ry. | 1924 | 19 | 371 | 969 | 957 | 12 | 96 | 241 | 226 | 15 | 182 | 252 | 245 | 7 |
| | 1925 | 19 | 346 | 905 | 895 | 10 | 145 | 344 | 331 | 13 | 212 | 295 | 263 | 32 |
| Louisville & Nashville RR. | 1923 | 13 | 299 | 352 | 351 | 1 | 45 | 86 | 86 | | 139 | 145 | 142 | 3 |
| | 1924 | 13 | 288 | 409 | 409 | | 70 | 169 | 169 | | 166 | 309 | 300 | 9 |
| | 1925 | 13 | 332 | 510 | 509 | 1 | 55 | 136 | 135 | 1 | 177 | 367 | 336 | 31 |

*Includes: Cincinnati Northern RR; Evansville, Ind. & Terre Haute RR.; Peoria & Eastern Railway, subsidiaries of the C. C. C. & St. L.

(13) Citation of appeal, with acknowledgment of service thereon.

(14) This præcipe.

(15) Clerk's Certificate of Transcript of Record.

(Signed by Mr. Thom) Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for Petitioners & Appellants.

Service of the foregoing præcipe, and the receipt of a copy thereof, are hereby admitted and acknowledged this 22nd day of July, 1930.

Elmer B. Collins, Special Asst. to the Atty. Gen'l., Slocitor for United States; Daniel W. Knowlton, Slocitor for Interstate Commerce Commission.

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[fol. 176] In United States District Court

Præcipe of United States of America and Interstate Commerce Commission, Defendants, for Additional Portions of Record to be Incorporated Into the Transcript of the Record for the United States Supreme Court—Filed July 25, 1930

To the Clerk of the United States District Court for the Western District of Kentucky:

Defendants hereby file this præcipe asking that additional portions of the record be incorporated into the transcript, namely:

The following recapitulations (from the returns of petitioners) showing separately for said petitioners the number of trips of their private passenger or office cars (transported free when occupied by passholders), number of occupants holding passes and number holding tickets, mileage covered on home and foreign lines and mileage of foreign cars (transorted free when occupied by passholders) on petitioners' lines. The evidence so shown in said recapitulations is to be included in the transcript as in addition to and supplemental to petitioners' "statement of the evidence, condensed as required by equity rule 75, presented to the District Court in this case" heretofore filed herein.

(Here follows table, side folio 177.)

[fol. 178]

MILEAGE

| | Year | Home cars on home roads | Home cars on foreign roads: Own line | Home cars on foreign roads: Other lines | Foreign cars on home roads |
|---|---|---|---|---|---|
| Baltimore & Ohio Railroad Company | 1923 | 287,099 | 88,329 | 47,632 | 90,059 |
| | 1924 | 260,901 | 83,212 | 48,576 | 68,500 |
| | 1925 | 288,631 | 98,935 | 64,777 | 89,266 |
| Chesapeake & Ohio Ry. | 1923 | 114,075 | 49,677 | 35,079 | 52,444 |
| | 1924 | 152,652 | 53,340 | 39,600 | 46,994 |
| | 1925 | 180,670 | 42,640 | 36,786 | 69,867 |
| Cleveland, Cincinnati, Chicago & St. Louis R. R.* | 1923 | 111,511 | 11,218 | 38,702 | 62,843 |
| | 1924 | 138,194 | 16,529 | 34,764 | 64,545 |
| | 1925 | 158,155 | 24,046 | 73,730 | 85,523 |
| Illinois Central Railroad, Yazoo & Miss. Valley Ry. | 1923 | 360,105 | 71,041 | 68,115 | 98,816 |
| | 1924 | 344,883 | 72,800 | 79,502 | 101,135 |
| | 1925 | 289,480 | 161,065 | 82,153 | 114,161 |
| Louisville & Nashville R. R. | 1923 | 116,304 | 24,452 | 31,011 | 43,849 |
| | 1924 | 111,862 | 40,307 | 41,176 | 50,814 |
| | 1925 | 147,847 | 28,604 | 35,253 | 53,167 |

*Includes: Cincinnati Northern R. R.: Evansville, Ind. & Terre Haute R. R.; Peoria & Eastern Railway, subsidiaries of the C. C. C. & St. L.

[fol. 179] Elmer B. Collins, Solicitor for United States; Daniel W. Knowlton, Solicitor for Interstate Commerce Commission.

Service of the foregoing præcipe asking that additional portions of the record be incorporated into the transcript, and the receipt of a copy thereof, are hereby admitted and acknowledged this 23d day of July, 1930.

Alfred P. Thom, Solicitor for Appellants.

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[fol. 180] In United States District Court

Order Filing Stipulation of Record—July 31, 1930

Came the petitioners and defendants herein, by counsel, and tendered a stipulation in regard to the record herein, which stipulation is ordered to be filed.

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[fol. 181] In United States District Court

Stipulation re Transcript of Record—Filed July 31, 1930

It is hereby stipulated that, instead of copying into the record for the appeal in this case the report of the Commission in the Tap Line case, 23 I. C. C. 277-298; in the Colorado Free Pass Investigation, 26 I. C. C. 491-494, and the report of the Commission in the Five Per Cent Case, 31 I. C. C. 351-410, which were introduced in evidence, the same may be availed of in the Supreme Court by referring to those reports as they appear in the official Interstate Commerce Commission Reports.

United States of America, by Elmer B. Collins, Special Assistant to the Attorney General; Interstate Commerce Commission, by J. Stanley Payne, Its Solicitor; Appellants, by Alfred P. Thom, Their Solicitor.

[fol. 182] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 183] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 7, 1930

[fol. 184] To the Clerk of the Supreme Court:

Points to be Relied On

The appellants hereby adopt the several assignments of error, as contained in the record, as a statement of the points upon which they rely on this appeal.

Designation for Printing

The appellants request that all of the record be printed, except:

1. The report of the Commission in the Tap Line Case, 23 I. C. C. 277, 298. (R. 127.)
2. The report of the Commission in the Colorado Free Pass Investigation, 26 I. C. C. 491, 494. (R. 128.)
3. The report of the Commission in the Five Per Cent Case, 31 I. C. C. 351, 410. (R. 129.)

The parts here indicated as not to be printed are covered by a stipulation in the record between counsel representing the various parties that the several reports of the Commission mentioned herein may be referred to in the offi-
[fol. 185] cial reports of the Commission instead of having them printed in the record.

Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Jr., Alfred P. Thom, Solicitors for Appellants.

August 7, 1930.

Service accepted this 7th day of August, 1930.

United States of America, by Elmer B. Collins, Special Assistant to the Attorney General; Interstate Commerce Commission, by Daniel W. Knowlton, Its Solicitor.

[fol. 186] [File endorsement omitted]

Endorsed on cover: File No. 35,255, W. Kentucky, D. C. U. S., Term No. 333. Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, et al., etc., Appellants, vs. United States of America, Interstate Commerce Commission and J. W. Cammack, Attorney General of the State of Kentucky. Filed August 5, 1930. File No. 35,255.

FILE COPY

FILED
OCT 31 19
CHARLES ELMORE C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930

**No. 333**

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, who sue, etc.,

*Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Appellees.*

## APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

## MOTION OF APPELLANTS TO ADVANCE

EDWARD S. JOUETT,
R. V. FLETCHER,
JOHN J. CORNWELL,
ROBERT B. TUNSTALL,
H. N. QUIGLEY,
ALFRED P. THOM, JR.,
ALFRED P. THOM,
*Solicitors for Appellants.*

HAYWOOD PRINTING COMPANY WASHINGTON D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, who sue, etc.,
*Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
*Appellees.*

No. 333.

---

## APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

---

## MOTION OF APPELLANTS TO ADVANCE

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The appellants in the above entitled cause respectfully move that this case be advanced for an early hearing, and, in support of their motion, make the following brief statement of the matters involved and the reasons relied on.

This is a suit in equity, brought under the

Urgent Deficiency Appropriation Act, of October 22, 1913, to suspend, restrain, enjoin, annul and set aside so much of two certain orders of the Interstate Commerce Commission, one entered on the 4th day of November, 1929 (a copy of which is printed in the record at page 10), and the other on the 30th day of July, 1929, amending its previous Pass Regulations (a copy of which is found printed in the record at pages 44 and 45), as undertake to declare unlawful and to prohibit the transportation or movement free and without charge, by one carrier subject to the Interstate Commerce Act, of the private or business cars of another such carrier when occupied by a person or persons using and lawfully entitled to use free transportation, or undertake to declare unlawful and to prohibit the accessorial transportation or movement of such cars in connection with or as incidental to such free transportation.

The case was heard by a court of three judges as required by the statute, and the final judgment or decree of the district court was entered on the 13th day of June, 1930, a copy of which is printed in the record at page 107. The effect of said orders of the Commission and of the decree appealed from is to prevent carriers engaged in interstate commerce from pursuing a practice which was universally engaged in by the carriers up to the time of the orders of the Interstate Commerce Commission complained of and which, to the extent in this cause complained of, is essential to the orderly and convenient conduct of the petitioners' business.

Much of a railroad officer's time is spent in

traveling, not only over his own lines, but to points on the lines of other railroads, in connection with questions of management and operation as well as of financial and other executive policies. As a part of the every-day business and affairs of his railroad, he must attend meetings and conferences with officers of other lines; must appear at hearings before the Interstate Commerce Commission and before State commissions; must be subject to the call of the President, of the Governors of States and other public officials concerned with matters and policies of transportation; and must attend meetings with civic, industrial and commercial bodies representing important public interests.

Such journeys frequently necessitate his absence from headquarters for weeks at a time. Day in and day out he is receiving and handling mail and business documents requiring his personal attention and executive authorization pertaining to the conduct of his railroad work in as great, if not in greater, volume than is necessary in any other line of business. He must take with him important and voluminous papers and office assistance, as he is liable to be confronted with urgent matters of business requiring immediate attention yet not pertinent to the particular trip. The necessity arises, in the interest of expedition and successful administration, for the carrying of considerable records, files, correspondence, papers, profiles, blueprints and necessary clerical forces. He must have all these at hand in order to administer, without hurtful delay, the affairs of the rail-

road. He takes them in what is known as a private, office or business car and this car is, in reality, the same as his office and, for the successful conduct of his work, he requires much the same facilities for working on these journeys as are available at his headquarters. This is equally true whether he is on his own or on a foreign line.

Seasonal inspection trips of their own properties and the study and inspection of the properties of others are universally recognized as necessary to good management and as having high educational value. On these trips the President and other executive officials, and sometimes a part or all of the board of directors, compose the party. Not infrequently much time and expense can be saved by a short cut outbound or returning home over foreign lines.

It frequently happens that the President of a railroad company, in connection with the finances of his company and for the purpose of attending meetings of his board of directors, must visit financial centers like New York, Chicago, Boston and others, and this is as much true of carriers whose lines do not reach these centers as it is of those that do. As the necessity for attending to the financial affairs of his railroad and for consultation with and meetings of his board of directors may require long absence from his own line, it is essential that he should have at these off-line points his files and other necessary documents so that he may there attend to the daily administration of his company's affairs. These are carried

and are made available to him and to his office force by these business or office cars.

In fact, the Commission's report in this case (record, p. 134), recognizes such car as an important facility for carrying on the business of the road, where it says:

> The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line, and when used for that purpose are an important facility for carrying on the business of the road.

The foregoing are illustrations of the importance of the use of private, office or business cars on foreign lines, but the appeal embraces as well other uses which are alleged to be lawful if the car is occupied by a person or persons using and entitled to use free transportation.

Such movements have, up to the time of the orders complained of, been made free and without imposing any charge, and this practice has existed from the earliest days of steam railroads. To disrupt and disturb it, as is done by the orders complained of, creates an entirely different and very onerous and inconvenient method of operating the properties, justified only if the practice is illegal.

The orders complained of affect all the railroads in the United States, about 270,000 miles in extent, and, in an important particular, control their daily operations.

In view of this wide influence of the Commission's action, it is of great importance that the

carriers should be advised at as early a date as possible as to the law applicable to the case and that the Interstate Commerce Commission should likewise be advised of what the law is, in order that they may properly administer the regulatory powers conferred upon them by the Interstate Commerce Act.

Wherefore the appellants pray that the case be advanced on the calendar and assigned for a hearing at an early date.

Respectfully submitted,

EDWARD S. JOUETT,
R. V. FLETCHER,
JOHN J. CORNWELL,
ROBERT B. TUNSTALL,
H. N. QUIGLEY,
ALFRED P. THOM, JR.,
ALFRED P. THOM,
*Solicitors for Appellants.*

October 23, 1930.
Copy received and service accepted.
(Signed) THOMAS D. THACHER,
*Solicitor General.*

October 29, 1930.
Copy received and service accepted.
(Signed) DANIEL W. KNOWLTON,
*Chief Counsel,*
*Interstate Commerce Commission.*

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IN THE

# Supreme Court of The United States

**October Term, 1930**

**No. 333**

LOUISVILLE & NASHVILLE RAILROAD COMPANY, et al.,
*Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
*Appellees.*

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.**

EDWARD S. JOUETT,
R. V. FLETCHER,
JOHN J. CORNWELL,
ROBERT B. TUNSTALL,
H. N. QUIGLEY,
ALFRED P. THOM, JR.,
ALFRED P. THOM,
*Solicitors for Appellants.*

HAYWORTH PRINTING COMPANY — WASHINGTON, D. C.

IN THE

# Supreme Court of The United States

October Term, 1930

No. 333

LOUISVILLE & NASHVILLE RAILROAD COMPANY, et al.,
*Appellants,*
v.
UNITED STATES OF AMERICA and INTER STATE COMMERCE COMMISSION,
*Appellees.*

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.**

## STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellants submit herewith their statement showing the basis of this Court's jurisdiction in the above-entitled cause.

### A
### STATUTES

As hereinafter stated, in paragraph C, this is a suit to suspend, restrain, enjoin, annul and set aside, in part, two certain orders of the Interstate Commerce Commission. It was heard, decided and the order appealed from entered in the District Court by three judges as required by law. Jurisdiction is conferred

upon this Court to entertain this appeal by the following statutes:

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), paragraph (a) (U. S. C. Title 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 219, 220) (U. S. C. Title 28, Sec. 47).

## II.

## DECREE

The final decree sought to be reviewed on this appeal was entered in the District Court on the 12th day of June, 1930. (R. 113.)

The petition for appeal (R. 116) was filed and the order allowing the appeal was entered on the 12th day of July, 1930. (R. 171.) Notice of appeal with service acknowledged was also filed on the 12th day of July, 1930. (R. 114, 115.) The case was docketed in this Court on the 5th day of August, 1930.

## III.

## NATURE OF THE CASE AND RULINGS BELOW

The suit (R. 1) was brought to suspend, restrain, enjoin, annul and set aside two certain orders of the Interstate Commerce Commission, one entered on the 4th day of November, 1929, a copy of which is filed with the record, and the other on the 30th day of July, 1929, amending its previous Pass Regulations, in so far as said orders or either of them undertook to declare unlawful and to prohibit the transportation or movement free and without charge, by any carrier subject to the Interstate Commerce Act, of the private or business car of another such carrier when occupied by a person using and lawfully entitled to use free transportation.

or undertook to declare unlawful and to prohibit the accessorial transportation or movement of such car in connection with or as incidental to such free transportation service.

The case was heard by a court of three judges as required by the statute, and a final judgment or decree of said District Court was made and entered on the 13th day of June, 1930. This appeal was taken within sixty days after the entry of such final judgment.

## D

## CASES RELIED ON TO SUSTAIN THE JURISDICTION

Baltimore & Ohio R. R. Co. v. U. S., 277 U. S. 291.
*Id.*, 279 U. S. 781.
United States v. Berwind White Coal Min. Co., 274 U. S. 264.
United States v. N. Y. Cent. R. R., 272 U. S. 457.
Brimstone R. R. Co. v. United States, 276 U. S. 104.
Western Union Tel. Co. v. United States, 271 U. S. 268.
St. L. & O'Fallon R. R. v. U. S. and I. C. C., 279 U. S. 461.

We respectfully submit that the Court has jurisdiction of this appeal by virtue of the statutory provisions hereinabove designated.

Respectfully submitted,

EDWARD S. JOUETT,
R. V. FLETCHER,
JOHN J. CORNWELL,
ROBERT R. TUNSTALL,
H. N. QUIGLEY,
ALFRED P. THOM, JR.,
ALFRED P. THOM,
*Solicitors for Appellants.*

August 7, 1930.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930

**No. 333**

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & SAINT LOUIS RAILWAY COMPANY, who sue, etc.,

*Appellants,*

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Appellees.*

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY**

## BRIEF FOR APPELLANTS

EDWARD S. JOUETT,
R. V. FLETCHER,
JOHN J. CORNWELL,
ROBERT B. TUNSTALL,
H. N. QUIGLEY,
ALFRED P. THOM, JR.,
ALFRED P. THOM,
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HAYWORTH PRINTING COMPANY, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930

| | |
|---|---|
| LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & SAINT LOUIS RAILWAY COMPANY, who sue, etc., *Appellants*, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*. | No. 333. |

**Appeal from the District Court of the United States for the Western District of Kentucky**

## BRIEF FOR APPELLANTS

This case is an appeal from an order of the court below entered in the above entitled cause on the 13th day of June, 1930.

The suit, in which the appeal is taken, was brought in the court below by the appellants as petitioners against the appellees, as defendants. The appellants, being five railroad common car-

(Italics herein are ours)
(R means Record)

riers subject to the Interstate Commerce Act, operating in the Western District of Kentucky and elsewhere in the United States, and suing for themselves and on behalf of practically all other railroad companies in the United States subject to the Interstate Commerce Act, instituted the suit to suspend, restrain, enjoin, annul and set aside, in part, two certain orders of the Interstate Commerce Commission, one entered on the 4th day of November, 1929 (R 10), and the other on the 30th day of July, 1929 (R 44).

The case was tried in the court below by three judges sitting as a district court (U. S. C., Title 28, Sec. 47, c. 32, 38 Stat. 208, 219, 220) and is here on a direct appeal from the order of that court (U. S. C., Title 28, Sec. 345, c. 229, 43 Stat. 936, 938, paragraph 4).

## STATEMENT OF CASE

One of the Commission's orders complained of (that entered on the 4th day of November, 1929) was made in a proceeding, instituted on the 7th day of December, 1925, by the Commission on its own motion for an investigation into and concerning the use of private passenger train cars, including so called office cars, in the transportation of persons, with a view of making such order or orders in the premises as might be deemed by it warranted. This order was entered pursuant to its report and decision which was rendered June 21, 1929.

The other Commission order complained of (that entered on the 30th day of July, 1929) was

an amendment made by the Commission of its previous Pass Regulations changing them from what they were at the time of the Commission's said report and decision, and was made for the purpose of conforming the Pass Regulations to that decision.

In the investigation above referred to a proposed report was submitted to the Commission on the 23d day of July, 1928, and was served upon appellants and all other railroad companies, sixty days from the date of such service being allowed for the filing of exceptions, this time limit being afterwards extended so as to include December 22, 1928.

On the last mentioned date exceptions were filed by the Association of Railway Executives on behalf of its membership, which at that time comprised, and now comprises, substantially all of the Class I railroads in the United States as such roads are classified by the Interstate Commerce Commission, these roads representing about 97 per cent of the railroad transportation revenues and about 91 per cent of the railroad mileage in the United States.

Argument was duly heard on these exceptions, and on the 14th day of March, 1929, the matter was submitted to the Commission. Its decision, called a report, was rendered on June 21, 1929.

The Commission's report was broad enough to decide that, *for whatever purpose used and irrespective of the use*, it was unlawful for a carrier to transport free the office car of another carrier even though occupied by persons entitled to use and us-

ing free transportation. By the order, based upon its report, it directed the carriers to "cease and desist on or before January 15, 1930, and thereafter to abstain from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates." (R. 10-11.)

The amendment made by the Commission, on July 30, 1929, of its "Regulations to Govern the Forms and Recording of Passes issued in 1917" was to add between lines 11 and 12 in paragraph 15 the following:

> "A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. *This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system.* See In the Matter of the Use of Private Passenger Train Cars, 155 I. C. C. 775." (R. 44-45.)

This amendment was made prior to the date of the Commission's order above referred to, but after its decision had been published.

This amended Pass Regulation, which is a detail in putting into effect the Commission's report, the appellants seek also to set aside in so far as it forbids the transportation of another carrier's office car when used as an instrumentality to transport a person lawfully entitled to use, and using, free transportation.

The Commission, in the order here in contro-

versy, summarizes the conclusions of its report in a statement of three propositions, thus:

> "1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another carrier free or at any other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;
>
> "2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately-owned or chartered cars; and
>
> "3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial."

The appellants are not attacking the third of these propositions; in other words, there is no effort here to set aside that part of the Commission's order which relates to the *transportation of revenue passengers in business cars* at the rate charged passengers holding tickets good only in the coach. It is the purpose of the carriers to remove this discrimination in some satisfactory way. This leaves only the first two propositions in controversy.

The Commission bases the first of these propositions on its holding in its report (R. 28) that

the private passenger car, including the so-called office car, is *property* shipped and when owned by a carrier other than that making the movement its transportation cannot lawfully be free, but must be covered by a tariff charge. This we deny to the extent and for reasons stated *infra* in the argument.

The other proposition announced by the Commission deals with unjust discrimination and undue preference and prejudice, as between the free movement of such a carrier-owned car, on the one hand, and a charge for the movement of privately owned or chartered cars, on the other. This is also controverted by appellants to the extent and for the reasons hereinafter stated.

Before undertaking to discuss the two issues involved in paragraphs 1 and 2 of the Commission's finding, above quoted, which, we submit, are the only ones involved in the case, we invite the attention of the Court briefly to the ground on which the court below relied for its decision, and shall undertake later herein to show that the court had no power to raise and determine that issue. The court rested its decision on an alleged unlawful discrimination between the *pass* holder carried in the private car and the *ticket holder* carried in the coach. (R. 102-5.) *There was no finding by the Commission and no evidence in the record as to such unjust discrimination or undue preference or prejudice.* Especial attention is called to this at the outset so as more accurately to define the issues and because of the obvious misconception on which the court below decided the case.

The complaint before this Court is confined to the aspect of the Commission's order which holds unlawful the movement by a carrier subject to the Interstate Commerce Act of the private or business car of another such carrier *when such car is occupied by a person using, and lawfully entitled to use, free transportation.* The prayer of the petition in the court below was that it should adjudge, order and decree that the finding of the Commission referred to and its orders in connection therewith, are and have at all times been beyond the lawful authority of the Commission in so far, *and in so far only,* as they or either of said orders undertake to declare unlawful and to prohibit the transportation or movement free of charge by one carrier subject to the Interstate Commerce Act of the private or business car of another such carrier when occupied by a person using, and lawfully entitled to use, free transportation, and undertake to declare unlawful and to prohibit the accessorial transportation or movement of such car in connection with or as an incident to such free transportation service. The reference to accessorial services is necessary to cover the movement of such car to the point on the moving carrier's line where the free transportation is to begin or, after the free transportation is over, the movement back to the owning line.

We shall discuss in detail and in their order the Commission's first two propositions above quoted, the only ones here involved; but it is deemed appropriate at this point to state the general proposition that, if the Interstate Commerce Act permits

the free transportation or movement of office cars here contended for, it destroys the basis for a claim of unlawful discrimination in the absence of an affirmative showing that the lawful act is being used for the purpose of making an unlawful discrimination, inflicting an unlawful prejudice or creating an unlawful advantage, as between two persons similarly situated. No unlawful discrimination can exist *per se* in respect to an act permitted by the statutes. In other words, if the Act permits the transportation or the movement free, or at other than tariff rates applicable to property that is shipped, the Act thereby makes lawful a difference and creates an exception, thus taking the movement, to the extent indicated, out of the field of unlawful discrimination unless it is affirmatively made to appear that this lawful act is being used in an unlawful way to make an unlawful discrimination or to inflict an unlawful prejudice or to create an unlawful advantage as between persons similarly situated.

It becomes important, therefore, to consider how far the first proposition above quoted of the Commission is sound in law; that is, whether it is sound in law to hold that the movement by a carrier of a foreign business car, occupied by a person lawfully entitled to use, and using, free transportation, constitutes a movement of property shipped and must be covered by a tariff charge. If it is sound in law, it is unnecessary to consider the second proposition, for it disposes of the appellants' contention. If it is unsound in law, the

second proposition falls with it, in the absence of the affirmative showing above stated.

This subject of unlawful discrimination will be discussed in greater detail in a subsequent part of this brief beginning at p. 64.

It appears from the Commission's report that its first proposition rests upon its claim that the practice in question is violative of section 6 of the Interstate Commerce Act, the substantive provisions of which are that shipments of *property* must be made pursuant to a printed tariff duly filed, and that freight charges therefor must be paid in accordance with the tariff.

The second declaration of the Commission is that the practice is violative of sections 2 and 3 of the Interstate Commerce Act, forbidding unlawful discriminations, etc.

While the questions presented in this record are questions of law, it may be useful at the outset to explain briefly some of the uses and functions of what are popularly known as private, business or office cars.

In the Commission's report they are generally referred to as "private passenger train cars, including the so-called office cars" and this designation is followed in the petition, but what is meant is the railroad business or office car. Since the name "private car" is not accurate and is liable to be confused with cars, privately owned, of persons and of companies other than railroad companies, the cars involved in this controversy will, for convenience, be frequently referred to herein

as "office cars." When that term is used, this explanation will indicate what is meant.

These cars are described in the Commission's report in this case as follows:

> "It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants." (R. 19.)

Much of a railroad officer's time is spent in traveling, not only over his own lines, but to points on the lines of other railroads, in connection with questions of management and operation as well as of financial and other executive policies of importance not only to his own road but to all the railroads of the country. As a part of the every-day business and affairs of his railroad, he must attend meetings and conferences with officers of other lines; must appear at hearings before the Interstate Commerce Commission and before State commissions; must be subject to the call of the President, of the Governors of States and other public officials concerned with matters and policies of transportation; and must attend meetings with civic, industrial and commercial bodies representing important public interests.

Such journeys frequently necessitate his absence from headquarters for weeks at a time. Day in and day out he is receiving and handling mail and business documents requiring his personal attention and executive authorization pertaining to the conduct of his railroad work in as great, if not in

greater, volume than is necessary in any other line of business. He must take with him important and voluminous papers and office assistance, as he is liable to be confronted with urgent matters of business requiring immediate attention yet not pertinent to the particular trip. The necessity arises, in the interest of expedition and successful administration, for the carrying of considerable records, files, correspondence, papers, profiles, blueprints and necessary clerical forces. He must have all these at hand in order to administer, without hurtful delay, the affairs of the railroad. He takes them in what is known as a private, office or business car and this car is, in reality, the same as his office and, for the successful conduct of his work, he requires much the same facilities for working on these journeys as are available at his headquarters. This is equally true whether he is on his own or on a foreign line.

Seasonal inspection trips of their own properties and the study and inspection of the properties of others are universally recognized as necessary to good management and as having high educational value. On these trips the President and other executive officials, and sometimes a part or all of the board of directors, compose the party. Not infrequently much time and expense can be saved by a short cut outbound or returning home over foreign lines.

It frequently happens that the President of a railroad company, in connection with the finances of his company and for the purpose of attending meetings of his board of directors, must visit finan-

cial centers like New York, Chicago, Boston and others, and this is as much true of carriers whose lines do not reach these centers as it is of those that do. As the necessity for attending to the financial affairs of his railroad and for consultation with and meetings of his board of directors may require long absences from his own line, it is essential that he should have at these off-line points his files and other necessary documents so that he may there attend to the daily administration of his company's affairs. These are carried and are made available to him and to his office force by these business or office cars.

In fact, the Commission's report in this case (R. 27) recognizes such car as an important facility for carrying on the business of the road, where it says:

> "The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line, and when used for that purpose are an important facility for carrying on the business of the road." (R. 27.)

But its further comment, that it is seldom that these duties necessitate a movement of the car over other lines, is not justified. It states, however, that in some cases such a movement may be justified for business reasons, for example, where it avoids a very circuitous haul over the home line.

A striking instance of the latter is found in the case of the Rock Island. As is well known, it has its general offices in Chicago, but it is an important line coming into Memphis from the west. It

reaches Memphis by crossing the Mississippi River over a long bridge, and Memphis is a very important point by reason of the location there of extensive terminals. The President of the Rock Island can leave Chicago on the Illinois Central at 6:15 in the afternoon and traverse the distance of 527 miles to Memphis, reaching that point next morning at 8:20. This involves practically no loss of time, measured by business hours. On the other hand, if he is compelled to go to Memphis on his own line, he would have to go down into Oklahoma, travel a distance of 1,377 miles, over three separate divisions, through Herington and El Reno, with the result that, if he leaves Chicago, at say, 6 p. m. on Monday, he would not reach Memphis until 6:55 Wednesday evening.

Other illustrations of conditions which exist all over the country are the following:

On the Illinois Central the distance from Gulfport to New Orleans over the Louisville & Nashville is 66 miles and the time of a typical train between these points, moving over the Louisville & Nashville, is 2 hours and 15 minutes. Both these cities are important places on the Illinois Central and it is frequently necessary for the officials of that company to travel from one of these points to the other. If those officers confine themselves to their own line, they have to move from Gulfport north to Jackson, Mississippi, and thence from Jackson to New Orleans—a distance of 343 miles—as against the Louisville & Nashville distance of 66 miles. Furthermore, by reason of the fact that the movement is over two divisions, it takes 16 hours

and 15 minutes to make the trip from Gulfport to New Orleans over the lines of the Illinois Central as against 2 hours and 15 minutes over the Louisville & Nashville.

It is true, also, as the Commission indicates, that such cars are occasionally used by railroad officers for other than railroad business purposes.

The railroads recognize, however, that the indiscriminate use of business cars has led to abuses. On this subject the Commission in its report says:

> "It is urged that while the practice of transporting foreign-line private cars without charge is lawful our investigation has shown that the courtesy extended as between roads has in some instances been abused. It is proposed to correct such abuses by the adoption of a code of ethics limiting such courtesies and calling for reports to be rendered covering the movement of private cars on foreign lines." (R. 38.)

It is doubtless true that at times the use of office cars in the entertainment of shippers has been resorted to for competitive reasons and that this and other abuses, which doubtless exist to some extent, should be corrected. The Commission in its report recognizes the efforts of the carriers to correct them. But in case of abuses, the abuses themselves should be attacked, as was done in the *Tap Line Case,* hereinafter cited, and not an effort made to prohibit a lawful practice. The matter of abuses, however, is not the question presented on this record.

In fact, the Commission itself seems to take this view, for in its report it says:

> "These and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of the private cars of other carriers." (R. 27.)

## ARGUMENT

The following is a summary of the main points involved in the argument:

1. The Interstate Commerce Commission has no powers except those delegated to it by Congress.
2. The movement is not a shipment of property subject to section 6 of the Interstate Commerce Act, which relates to property shipments.
3. The transaction here involved does not violate the discrimination provisions of the Interstate Commerce Act.
4. The lower court's decision was based upon an alleged discrimination not found nor even mentioned by the Commission and hence not in the case.

All of the assignments of error (R. 110) are to be urged.

### I

### THE INTERSTATE COMMERCE COMMISSION HAS NO POWERS EXCEPT THOSE DELEGATED TO IT BY CONGRESS

Before proceeding to define and discuss the issues here presented, it may be well to make brief comment on the power and jurisdiction of the Commission.

The power to regulate interstate commerce is, by

the Constitution, vested in Congress—not in the Commission. The Commission can exercise the power of regulation only in so far as such power is delegated to it by Congress. Even then, the Commission must follow, in exercising its functions, the standards set up for it by Congress. It has no independent powers.

The jurisdiction of the Commission is strictly statutory and is confined to the powers conferred by the Act.

> *Re Express Companies,* 1 I. C. C. 369.
> *Re Chicago, Saint Paul & Kansas City Ry. Co.,* 2 I. C. C. 253.
> *Railroad Commission of Kentucky v. Louisville & Nashville R. R. Co.,* 10 I. C. C. 173.

The following is quoted with approval by this Court in the *O'Fallon Case*:

> "The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction."

—thus indicating, as is well understood, that the powers of the Commission are only delegated powers. *Saint Louis & O'Fallon Ry. Co. v. United States,* 279 U. S. 461, 487.

Congress has delegated explicitly to the Commission certain administrative powers in respect to regulation; for example, it has been given such powers in respect to safety appliances, in respect to accounts, in respect to the issue of securities, and in respect to "car service," which latter, in

precise and express terms, it limits to *vehicles, etc., used in the transportation of property.* Congress has carefully refrained, so far, from conferring authority in respect to *passenger service* similar to that it has conferred in respect to service for the transportation of property; and in fact has given the Commission no power to establish rules, regulations, and practices with respect to *passenger service* or to establish rules for compensation to be paid for the use in *passenger service* of any locomotive, car, or other vehicle not owned by the carrier using it, as it has done in respect to the freight service. *Interstate Commerce Act, section 1, paragraph (10).*

The Commission, under the Act, has no power to regulate the type, character, supply or use of vehicles used by a carrier in performing its passenger service.

*Worcester Excursion Car Co. v. Pennsylvania R. R. Co.,* 3 I. C. C. 588.

*Pacific Engineering & Construction Co. v. Chicago, Rock Island & Pacific Ry. Co.,* 56 I. C. C. 249.

*Chicago, etc., R. R. Co. v. Pullman Car Co.,* 139 U. S. 89-90.

## II

## THE MOVEMENT IS NOT A SHIPMENT OF PROPERTY SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT, WHICH RELATES TO PROPERTY SHIPMENTS

In order to determine this issue, it becomes necessary to interpret section 6 of the Interstate Commerce Act in connection with paragraph (7)

of section 1 and paragraph (1) of section 22, and to determine whether it applies, when considered in connection with the other provisions mentioned, to the movement of an office car under the circumstances shown in this record.

The pertinent part of section 6 is the requirement that tariffs be filed showing the rates, fares and charges for transportation between points on its own routes and those of another carrier. For convenient reference, the pertinent parts of section 6 are here quoted:

> "(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation."
>
> "(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different

compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The contention of the appellants is that upon four separate grounds, any one of which is sufficient, this section of the Interstate Commerce Act does not apply to the movement of an office car under the circumstances shown in this record:

(1) The movement of the car is not a *shipment of property* in the sense contemplated by section 6, which refers to freight shipped from consignor to consignee, for here the office car becomes a *facility of the carrying line* in which are carried persons for whom the carrying line would otherwise have to furnish facilities of its own.

(2) If, however, the car should be regarded as remaining for all purposes the property of the owning line, there is still no such shipment as section 6 contemplates, and the movement of the car would be simply *incidental to the free transportation* afforded its occupants.

(3) This interpretation, that the statute does not refer to the movement of an office car and hence no freight charges for such a movement must be paid, has been the *uniform contempo-*

*raneous and practical construction* of the Act by the Interstate Commerce Commission and by the carriers throughout the history of railroading in this country, and has been continuous up to the time the order here in controversy was issued. If the statute, by reason of this new claim of the Interstate Commerce Commission, be regarded as doubtful in meaning, this long continued contemporaneous construction by the governmental body charged with administering and enforcing it is of controlling weight with the courts.

(4) With this long continued construction of the statute by the Interstate Commerce Commission, presumably with the knowledge of Congress, the latter has repeatedly amended the Interstate Commerce Act, and the sections dealing with free transportation in particular, and in 1926 *it reenacted the entire Act, including these sections, without change.* Thereby, under a long line of authorities in this Court, such construction is read into the statute and becomes binding upon the courts.

The third and fourth grounds are similar, but not identical.

The first proposition, above quoted, of the Commission declares that any and all transportation or movement of office cars by one carrier for another or its officials, free or at other than published tariff rates, is contrary to the provisions of the statute. It thus includes in its condemnation the transportation or movement of such cars even though occupied by a person lawfully entitled to use, and using, free transportation.

Inasmuch, therefore, as the complaint in this

case is not as broad as the finding, the finding, for present purposes, may be thus stated:

> The transportation or movement of office cars, by one carrier for another or its officials, free or at other than published tariff rates, is contrary to the provisions of the Interstate Commerce Act, even though the car be occupied by a person lawfully entitled to use, and using, free transportation.

It will be observed that the finding seems to concede, as is true, that, in order for such transportation or movement to be unlawful, it must be "contrary to the Interstate Commerce Act."

There is nothing in the general law to make such transportation or movement unlawful. If it is unlawful, the prohibition must be found in the statute; and this is conceded by the Commission in the statement in its first proposition, that the practice is "contrary to the provisions of the Interstate Commerce Act." If the prohibition is not found there, no report or order of the Commission can make the practice unlawful or have any legal effect upon it. Certainly Congress has never delegated to the Commission any power or discretion with respect to free passes or free transportation of persons included in certain designated classes. From the first, Congress has been careful to keep that subject in its own hands and has refrained from conferring any jurisdiction in respect to it on the Commission.

The original Act to Regulate Commerce, approved February 4, 1887, provided in section 22 that

> "nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

This provision of the original Act, although there have been many amendments and revisions of the Act itself, has continued in force and it is today contained in the law without impairment, abridgment or change.

The provisions on the subject, as it is in the law now in force, will be found in paragraph (7) of section 1 and in paragraph (1) of section 22.

Paragraph (7) of section 1 expressly excepts from the prohibition against the issue of interstate free tickets, free passes or free transportation for passengers, a carrier's "employees and their families, its officers, agents, surgeons, physicians, and attorneys at law," and contains a further limitation upon the general prohibition of free transportation, as follows:

> "*Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families."

And paragraph (1) of section 22 contains the provision above quoted.

In addition to the persons above excepted from the requirements as to payment for transportation, there are a number of others also excepted,

such as "ministers of religion," "persons exclusively engaged in charitable and eleemosynary work," "indigent, destitute and homeless persons," "inmates of the National Homes or State Homes for Disabled Volunteer Soldiers," and persons carried "with the object of providing relief in the case of epidemic, pestilence or other calamitous visitation."

The foregoing limitation upon the Commission's power in respect to the issue by carriers to certain classes of persons of free tickets, free passes or free transportation being express and not susceptible of change or limitation by the Commission, it only remains to construe it properly.

At the time of the enactment of this law and at the time of each of the amendments which have been made, there were well known and well recognized methods of giving this free transportation. It could be given by not exacting compensation for a passenger riding in one of the passenger coaches of the transporting company; in a Pullman car not belonging to the carrier; in one of the carrier's own private or official cars; or by transporting the passenger free in a private or business car of another line.

The report and order in question undertake to limit the power of the carrier only in respect to the last named method, namely, that of transporting the passenger in a car belonging to another line. It does not deny the lawful right of the carrier to transport a free passenger in one of its own coaches, in a Pullman car in use on its lines, or in one of its own official cars; and it bases the

distinction between the lawful right of the carrier to transport a passenger free in one of its own official cars, and the right to transport the passenger free in an official car of a foreign line, on the conclusion, which the Commission reaches, that such a car of a foreign line is *property under shipment and must be paid for as such.* It denies the right of a carrier to treat a foreign business car as a facility of travel and as a method of giving the free transportation which it has promised and the law permits.

An intelligent understanding of the statutes thus requires an examination of the status of foreign-owned passenger cars under different conditions on the line of the carrier performing the service.

### 1. A Railroad Office Car in the Movement Here Under Consideration Is a Facility of the Carrying Line and Ranks as Its Own for the Purposes of the Service

Undoubtedly a passenger train car belonging to one carrier may be an article that is shipped over the line of another as an article of commerce for delivery at a specified destination, as for example a new car shipped from the place of manufacture to the railroad acquiring it. In such a case it is treated as consigned property, or as an article of freight, must be covered by a tariff and the transportation must be paid for as freight; but it is also true that it may be an instrumentality or facility of commerce, in which case it is not an article to be transported as freight and is not required to be covered by a tariff or paid for by a transportation charge.

This distinction has been recognized and declared by the Commission itself in a number of cases.

In *McCloud River Ry. v. Southern Pacific Co.*, 56 I. C. C. 287, 290, 291, the Commission, in speaking of cars of other than carrier's ownership, said:

> "The use of such cars as instrumentalities or facilities of commerce in interchange service, in short, is a matter of contract, and whether they were accepted by defendants for such use in the present case or received as articles of freight for transportation to destination is a question of fact to be determined by the evidence.
>
> ". . . *it is within the discretion of carriers whether they shall receive and use cars of other ownership as facilities of carriage in* ***interchange service,*** and it follows that consent to do so in one case and refusal in another is not necessarily unlawful discrimination under the act to regulate commerce."

While it is thus stated by the Commission that it is within the discretion of carriers whether they shall receive and use cars of other ownership as facilities for the transportation service they are performing, it will be observed that a carrier would have no such discretion if a car was tendered to it as freight for shipment. Under the latter conditions its duty as a common carrier would be to accept, carry and deliver in accordance with its tariff.

The distinction between the two cases is clearly recognized by the Commission itself.

In *Pacific Engineering & Construction Co. v. Chicago Rock Island & Pacific Ry.*, 56 I. C. C.

249, the Commission, in discussing the difference between cars as articles of commerce and as instrumentalities of commerce, said:

> "While it is the duty of all common carriers subject to the act to furnish suitable and adequate facilities for all reasonable necessities of the business in which they engage, they are at liberty *to choose their own appropriate means of carriage. Worcester Excursion Car Co. v. Penn. R. R. Co.*, 3 I. C. C. 577. They are not common carriers of cars of other ownership employed solely as instruments of carriage, and *may decline to accept them for such purposes* in lieu of their own, although *bound to accept them when offered merely as articles to be transported.*"

In the case last cited, the question was whether the cars transported were transported as vehicles and facilities of commerce or as articles of freight for transportation to particular destinations. In respect to this matter the Commission said, at page 248:

> "The complaints and evidence are not directed to the amount of the charge assailed, but to the imposition of any charges as unreasonable in view of the use of the cars as transportation vehicles and the derivation of the same revenue from their lading as would have been obtained if the carriers' own equipment had been used.
>
> "A conclusion contrary to the complainants' contentions seems to us to have the better support. The cars were delivered to the carriers as articles, rather than as instruments of commerce, for transportation to particular destinations."

The distinction between cars used as vehicles and facilities of commerce and those shipped as articles of freight is here again distinctly recognized. The same distinction is adverted to and impliedly approved in the case of *Haffner Thrall Car Co. v. Northern Pacific Ry. Co.*, 146 I. C. C. 47, decided June 16, 1928.

This distinction is also recognized in the report of the Commission in the case at bar, 155 I. C. C., pages 786-7; and even as late as October 3, 1929, the Commission decided the case of *Furnas Ice Cream Co. v. Norfolk & Western Ry. Co.*, 157 I. C. C. 617, in which it says:

> "Complainant is not here seeking an order that would require the defendant to provide itself with special equipment to take care of its needs. On the contrary, complainant intends furnishing the car. What is here sought is an order establishing carload rates to be applied on the car which complainant intends to procure at some future time. Complainant's car is apparently *not to be offered as an article of commerce, but rather as an instrument of commerce.*"

and refers, as authority for the italicized statement, to two of the cases above mentioned, namely, *Pacific Engineering & Construction Co. v. C. R. I. & P. Ry. Co.*, 56 I. C. C. 247, and *McCloud River Ry. Co. v. S. P. Co.*, 56 I. C. C. 287.

It has always been recognized that, while it is the duty of all common carriers subject to the Act to furnish suitable and adequate facilities for all reasonable necessities of the business in which

they are engaged, they are at liberty to choose their own appropriate means of carriage (56 I. C. C. 249, *supra*), and, in order to furnish the appropriate means of carriage, such carriers may obtain them by construction, by purchase, by contract as in the case of Pullman cars, by gift, by loan, by lease or in any other legitimate manner. *Cases above cited* and *Judson on Interstate Commerce (3d Edition)*, section 299.

Indeed, by paragraph (4) of section 1 of the Act it is now expressly provided:

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor . . ."

and by paragraph (3) of the same section it is provided that

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, . . . etc."

This obligation and right have been recognized by the Commission itself from the beginning.

Thus, in the case of *William C. Scofield et al. v. Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 118, decided July 19, 1888, in the Cooley days of the Commission, the Commission said:

> "The law-making power has not taken upon itself the responsibility, nor has it clothed the

Interstate Commerce Commission with the power, and the responsibility, of directing a carrier to supply itself with any particular equipment of cars, or, in fact, with any equipment or cars at all, for the transportation of freight over its line. The responsible duty of supplying itself with a sufficient and proper equipment of cars is left by the statute to rest with the carrier, to whom alone it rightfully belongs, and if the carrier fails to do this in such a manner as it should, whereby others are injured or wronged, then that the carrier shall be liable for all the damages which result from such failure."

The Scofield case was a case relating to freight cars, but in the same year, 1888, the case of *Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, which involved the status of *passenger cars*, was presented to the Commission and was decided in April, 1890. In its decision the Commission says in this case relating to passenger cars:

"The statute has not relieved railroad companies from the duty of providing their own equipment, nor changed the method of providing it. They may do it by construction, by purchase, or by contract for their use. But no one has a right to compel a railroad company to select among these modes, or to contract with all comers. How cars shall be provided *is entirely matter of private contract.* And whether private cars of companies or persons shall be hauled is matter of discretion and private agreement."

*Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, 3 I. C. C. 584.

And again, on page 588:

> "The law-making power has not undertaken to divide responsibility with the carrier in the selection of cars, nor has it clothed any civil tribunal with any such power. The responsibility of selecting safe, suitable, and sufficient car equipment for the transportation of passengers over its line *is left by law with the carrier;* and in the performance of this duty the carrier has rights and grave responsibilities resting upon it. Whether seated in a Pullman car or a Worcester car, passengers traveling over defendant's line would be the passengers of the defendant, and it would be entitled to receive and collect their train fare and responsible for their safe carriage; and as part of the transaction the defendant would have to pay to the company owning the car a reasonable rental for its use during the journey."

Not only has the carrier the right and is clothed with the duty of providing proper equipment for the service it renders in the transportation of passengers, but when it secures equipment belonging to another line and uses it in its own transportation service, such equipment *becomes its own for the purposes of the carriage.*

As is said in the case just cited, beginning at the bottom of page 584,

> "It has the right to supply its own road in that manner with vehicles suited to its business and to its line, and by voluntarily using them *they become the same as its own for the purpose of carriage.* Every company judges for itself what style of car it desires for

its passengers, and its reasons are unimportant so long as its patrons are properly served, *nor is it material how the cars are procured.* Whatever discretion of preference a carrier may exercise in the choice of passenger cars in its business is *outside of the statute and only an exercise of legitimate authority.* It relates to the physical operation of the road, for which the carrier is responsible to the public and to the law.

* * * * * *

"There is nothing in the Act to regulate commerce that indicates a different view on this subject so far as the mere physical operation of railroads is concerned *in the carriage of passengers.* That there must be no unjust discrimination, or unlawful preference, or undue prejudice or advantage, or disadvantage or extortion, is all true. But these cover a very different field from the power and duty of the carrier to legitimately *exercise the authority of selecting cars of its own choice for the transportation of passengers* over its line."

And again, on page 588, the Commission says:

"And in performing so extraordinary, and to some extent, hazardous service as that of transporting passengers over its lines, the carrier may well say that it will do so only in its own cars, or cars *which it has made its own* by selecting them for that purpose."

It will thus be seen that the Commission draws a clear distinction between the status of cars belonging to one company on the lines of another in cases where they are *shipped as articles of freight,*

and hence for tariff purposes are property, and cases in which they are *used as instrumentalities or facilities of transportation*, in which latter case they are not only not property or articles of freight, *but rank in law as the cars of the company moving them*.

This same principle—that the cars furnished by a carrier, even though belonging to another, while in its possession and use in rendering a transportation service, become its own cars—is declared by this Court. The Court says:

> "The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was *a matter of indifference to the public who owned them*. . . . But we are of the opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing-room and sleeping cars to be used by its passengers, and, as a means of inducing the

plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. The defendant did not, by such an agreement, abandon the duty it owed to the public; for the cars so furnished, while in its possession and use, became, as between it and its passengers, *its own cars*, subject to such regulations as it might properly establish for the comfort and safety of passengers on its trains."

*Chicago, etc., R. R. Co. v. Pullman Car Co.*, 139 U. S. 89-90.

This view is also emphasized by the case of *Pennsylvania Co. v. Roy*, 102 U. S. 457, where the Court says:

"For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, *were, in law, the servants and employees of the railroad company*. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company."

See also 2 *Hutchison on Carriers, Third edition*, Sec. 916.

In respect to the question above discussed, in regard to the difference between a car shipped as freight and a car being used in the performance of a transportation service, the report of the Com-

mission in this case seems to recognize that this just and well known distinction presents a difficulty which the Commission, in order to uphold its conclusion, must remove, for it says (R. 33):

> "Passenger cars of one carrier are sometimes operated over the lines of other carriers in maintaining through service. The terms on which this is done are a matter of contract, but in the absence of other arrangement the owning line is paid certain amounts per mile or per diem under rules of the American Railway Association." (It will be observed here it is stated that the owning line is paid—not charged—for the use of its car.) "As in the case of freight cars, no charges are assessed for the handling of cars in service, but cars not in service are subject to the charges in the consolidated classification. *The criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car;* that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line."

This expressly recognizes the difference between the two classes, but it is difficult to perceive how the Commission can hope to sustain its criterion here announced for determining to which class a car belongs in any particular movement. The test of whether or not a car is in service cannot be whether it is producing revenue, as long as the law recognizes that certain *transportation services* may be rendered without producing revenue. The test is not whether the car is producing revenue,

but whether it is performing a transportation service.

For example, it is provided in section 22 of the Act:

> "That nothing in this Act shall prevent the carriage, storage, or handling of property free . . . for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibitions thereat, etc."

If a carrier undertakes, pursuant to this statutory authority, to transport property of the United States free in a car belonging to another carrier, it would not be a revenue service, but it would be a transportation service and the car in which the freight was loaded would be an instrumentality of transportation. According to the Commission's criterion, inasmuch as it was producing no revenue, it would not be in service at all and the non-owning carrier would have to charge the owning carrier for its use.

We would thus be confronted with this remarkable situation. The United States Government might be shipping munitions of war from the Washington Navy Yard to the Boston Navy Yard, involving a through route over the Pennsylvania and the New Haven roads. These munitions might be loaded in a Pennsylvania freight car, which would go through to destination over the Pennsylvania and the New Haven roads to the Navy Yard at Boston. The entire service, under the statute, might be rendered free. The Pennsylvania Railroad, owning the car, need not charge

for it, but when the same car is delivered to the New Haven and the shipment is moved by it from New York to Boston, the New Haven, under the criterion of the Commission, would have to charge the Pennsylvania for its use, because it would not be a revenue movement, but a free movement, of the munitions. The Commission's criterion, producing such a result, cannot be sound as applied to the case of freight.

But the Commission concedes that the criterion for determining when a passenger car is in service is the same as that for determining when a freight car is in service. If the revenue criterion fails in respect to a freight car, it must, by the Commission's own concession, fail also in respect to a passenger car. In the case of a person permitted by law to travel on a pass, and actually traveling on a pass, the carrier which has issued the pass, in hauling him over its line unquestionably performs a transportation service. The inherent nature of the service is not affected by the fact that the carrier is honoring its own free pass. The carrier's contract with the pass holder is to furnish him free transportation service.

Throughout the report statements occur which indicate that, in the opinion of its author, when one carrier hauls a car belonging to another carrier, occupied by a person entitled to use and using free transportation, the first carrier is performing the service for the foreign line carrier; whereas an accurate analysis of the situation shows that the service is not being performed for the other carrier but is being performed to carry out the

moving carrier's own contract for free transportation, which under the statute is lawful.

Nor does the carrier, as to such passenger, lose its character as a common carrier. In the celebrated *Lockwood case* it was argued before this Court that a carrier in hauling a passenger free under the terms of a pass which it had issued, lost its status as a common carrier by entering into a special contract with the passenger exempting itself from liability for negligence.

In dealing with that argument this Court said:

> "We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such *by virtue of their occupation, not by virtue of the responsibilities under which they rest.* Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders

him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods?

". . . But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

*Railroad Co. v. Lockwood,* 17 Wallace (84 U. S.) 376-7.

The accurate and sound reasoning here used in effect declares the principle that it is the nature of the employment, and not the mere incident of a special contract about it, which determines whether or not a carrier is a common carrier. And likewise the argument would seem to be sound that it is the nature of what the carrier is doing in transporting a passenger and not the mere incident of whether it secures revenue for the service, which determines whether or not the carrier is performing a transportation service.

It being universally true that a carrier, in providing itself with facilities to perform its transportation service, does not *charge* the owner of the facility in which the service is performed for its

use, but more frequently, as in the case of freight cars, and even of passenger cars, *pays* the owning company a per diem for their use, there would seem to be no ground whatever for the contention that when a carrier undertakes to perform a transportation service for a person to whom it has agreed to furnish free transportation and does so in a vehicle which it obtains from another, it should be required to charge, or even justified in charging, the owner of the vehicle for its use.

The Commission in effect admits, as it should, that the law permits a carrier subject to the Act to carry passengers of the designated classes free in its own coaches, in Pullman cars which it hires or operates under contract, and in its own private or business cars. There is no reason to justify the conclusion that the carriage of the same passenger, including the car in which he travels, free, becomes unlawful if he is transported in a car which the carrier borrows from another company or which the other furnishes for the purpose; for the Commission expressly states, in *Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, 3 I. C. C., at page 584, that "*it is not material how the cars are procured.*"

From the foregoing authorities and considerations it seems abundantly evident that when a carrier is moving a car belonging to another company, occupied by a person lawfully holding its pass or contract for free transportation and as the selected facility for furnishing the transportation service, it is not moving property belonging to another in the tariff sense or as a shipment of

freight, but is simply performing a transportation service in a vehicle which it has selected and thus made its own for the purpose, and is not obliged, under the law, to make a charge for the movement of it.

The carrier has the right, in honoring its contract for free carriage to a passenger, to select the vehicle in which the service is performed.

Perhaps it will be conducive to clear thinking on this subject to disregard, so far as this *property* point is concerned, the *character of the car* in which the transportation is made, and to consider it from the standpoint of the foreign-owned car being merely a day coach. If a number of the officers and employees of one carrier, holding passes enabling them to free transportation, wished to travel over the line of another, and the moving line did not have a day coach convenient in which to give the transportation, would any one suggest that the moving line would not have a right to secure from the other carrier the use of one of its coaches for the purpose? And, in that case, would any one suggest that the movement of that day coach filled with pass-holding passengers, would be the movement of *property* for which a charge should be imposed?

The Commission, to maintain the issue on its part as to the movement of the car being a movement of property, refers in its report to two cases, neither of which, we submit, has any bearing upon the question.

In neither of them was any question presented as to the movement of a car, not owned by the

carrying company, as a facility or instrumentality of its transportation service.

The first of these cases is *American Express Co. v. United States*, 212 U. S. 522.

In this case the question was whether, under the exceptions of paragraph (7) of section 1, a *package*, admittedly an article of freight and not a facility of transportation service, could be transported free under an express frank; and not whether a facility or instrumentality of commerce belonging to another, but being used by a carrier in the performance of its own transportation service—not being handled as an article of freight—might be lawfully transported free. This Court held that the package was *goods* and that the exception to the Act was not broad enough to permit the free carriage by such carrier of such *goods*.

The other case on which the Commission relies is *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 225 U. S. 326.

In this case the question was whether railroad companies might charge a different rate for the *transportation of coal* to a given point for a railroad than it charged to other shippers, the coal being intended for the use of the railroad as fuel. This is in no way parallel to the case at bar and did not involve in any sense a facility being used for the purpose of rendering a transportation service. It being obviously an *ordinary freight service*, the Court held that such articles as fuel coal must be carried for all alike.

We submit that there is nothing in either of these cases to sustain the Commission's view.

### 2. The Car Is in Any Event an Incident to the Free Movement of the Passenger

By reference to the statute it will be observed that, in authorizing the use of free transportation, the statute does not undertake to define how the service of free transportation shall be rendered. It does not impose a limitation on its character nor upon the facilities or instrumentalities that may be furnished. It may be in any vehicle which is safe and suitable for the purpose and which the carrier making the movement may select and provide. There is likewise no limitation imposed by law to prevent such carrier from accepting or securing from another carrier the vehicle in which such transportation service is to be rendered nor as to the terms on which such vehicle may be secured. It is fair to say that the Commission in effect admits that the free pass, authorized by law to be issued, may, as an incident of its issue and use, be honored in a Pullman car or in a private or business car of its own, and need not be confined to passage in a day coach. (R. 32.) If this be true, as it undoubtedly is, it is lawful to treat the movement of any car, whether owned by the carrier or not, which it uses to carry out its promise, lawfully made, of free transportation, as an incident of such transportation and as included in the statutory authority to issue and honor free passes and other forms of free transportation. In no respect is it a shipment of freight.

In both the aspects of this transaction hereinbefore discussed there is wholly lacking an essential element of a freight shipment under a tariff,

and that is *the right to demand this transportation.* No such right exists with reference to the movement of an office car. Handling it is purely a matter of choice on the part of the carrying line.

In respect to the point now being discussed the court below, in its opinion (R. 105), says:

> "... when Congress authorized the carriers affected by the Act to give free tickets or passes to their own officers and employees and their families, and to exchange with other such carriers passes for their officers and employees, we must assume that Congress used the words 'free ticket,' 'free pass' and 'pass' in the sense that those words are commonly and ordinarily understood. A pass or a free ticket, as ordinarily understood, connotes free transportation in the ordinary way and with the usual conveniences afforded the paying public. To construe the permission to grant free passes and free tickets, contained in Section 1 (7) and Section 22 (1), as authorizing not only free transportation of the holder, but transportation in a private car with all the conveniences thereof, would amount to a distortion of the language used and a perversion of the central purpose of the Act."

It is undoubtedly true that we must assume that Congress used the words "free ticket," "free pass" and "pass" in the sense that those words were commonly and ordinarily understood. The fact, however, is that it was universally known, not only to the public generally but to Congress, at the time that those words were put in the Act that the giving of free transportation has, from

the beginning of railroad history in this country, included, and up to the time of the Commission's decision in this case did include, whenever a carrier desired to furnish it, the free passage not only of the person but of the foreign-owned business car in which he was carried. And it is respectfully submitted that these words must be interpreted in the light of that practice of which judicial notice will be taken, and not given the narrow construction which they are given by the District Court.

While a contract for free carriage of a person does not give such person a contract right to demand to be carried in a private or business car, yet the carrier contracting to give him free passage may select its own means of carrying it out and may elect to perform it in a private or business car secured from another. "It is not material how the car is procured." *Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, 3 I. C. C. page 584.

In the next succeeding paragraph of this brief it is shown that the interpretation of the words just given was well known to the Commission and has been accepted and acted on throughout the 42 years of its history. And in paragraph 4, *infra* p. 63, of this brief it is shown that this construction was expressly made known to Congress in the *Five Per Cent Case*, the record of which was printed as a Senate document (R. 119).

### 3. The Practice, Well Known to the Commission, Has Been Both Impliedly and Expressly Recognized By It as Lawful Throughout the 42 Years of the Commission's History

(a) *Construction Given by Commission*

If the foreign car was property being shipped as freight and thus subject to tariff charges, the Commission has all the time known that it was the duty of the carriers in such case to make and file tariffs under the provisions of section 6 of the Act; and it has also known that no such tariff had ever been filed covering a case in which a foreign car was moved when occupied by a person using, and lawfully entitled to use, free transportation (R. 97).

Moreover, the question of the legality of the practice of carrying free the car of another company when occupied by a person entitled to use, and using, free transportation was, in the year 1911, presented to and considered by the Commission in what is known as the *Tap Line Case*. There it was declared by the Commission to be unlawful for an officer of a tap line to use free transportation, on the ground that he was using it for the purposes of a proprietary lumber company, which it considered unlawful, and was, because of its illegal use, taken out of the statute permitting free transportation of persons—not referring particularly to the car. But the Commission in that case states that the passes before it, in some cases, called for the movement of "car and party," thus showing that it had knowledge of the practice,

and it refrained from declaring the free movement of such car as unlawful. The Commission says:

> "With scarcely an exception the officers of the tap line are officers of the lumber company in the interest of which it is owned and operated. Throughout the record it was frankly admitted that they make use of the privilege of free transportation extended to them by the trunk lines even when traveling on the business of the lumber company and in the capacity of an officer of the lumber company. In one case 'car and party' passes are shown to have been used. This is another of the advantages to industries that own short lines serving their plants, and which they have caused to be incorporated as common carriers. The use of such free transportation we regard as altogether improper and unlawful, even though the holder may be an officer of a tap line that we have found to be a common carrier. The affairs of the proprietary lumber company are so interwoven with the affairs of the tap line as to make it impossible to admit the right under the law of an officer of a tap line to use free transportation."
>
> *The Tap Line Case*, 23 I. C. C. 277, 298.

Again, in 1913, in the *Colorado Free Pass Investigation*, the Commission shows that it knew of the practice, and it failed to condemn it on the ground that it was unlawful to move, without charge, the car of another company. It says:

> "An example of a car and party pass given to an officer of one of these lines was shown of record, and, as the facts are understood, was wholly improper, having undoubtedly

been intended as a special favor to one connected with an industry having a large interstate traffic, the good will of which was thought to be worth cultivating in that form."

*Colorado Free Pass Investigation*, 26 I. C. C. 491, 494.

Here again the Commission had the opportunity of condemning the practice on the ground that it was *unlawful* to move the car of another company without charge, but refrained from doing so, placing its decision on the ground that the "car and party" pass was "intended as a special favor to one connected with an industry having a large interstate traffic," etc.

Again, in the *Five Per Cent Case*, in 1914, in considering what the carriers in Official Classification territory might do to increase their net revenues, the Commission issued a questionnaire to the carriers in the territory referred to, one of the items in the questionnaire being headed as follows (R. 119).

"Statement showing the private cars moved over the lines of the respondent during the year ended June 30, 1913, *on passes* or other free authority issued to other than respondent's officials and employees, the approximate expense of handling such cars, and the revenue that would have accrued to respondent if cars had been moved at tariff rates."

Responses were made by the carriers, and the movement of such foreign cars free and without tariff charges was by these answers shown to be an habitual practice. This questionnaire and the

responses will be found in Senate Document No. 466, 63d Congress, 2d Session, at pages 6796-7, the record in the *Five Per Cent Case* having been printed as a Senate Document (R. 119).

The Commission here again had an opportunity to declare the practice unlawful, but refrained from doing so and impliedly treated it as lawful, because in its report in that case it was merely *suggested* to the carriers that they might conserve their net revenues if they would voluntarily curtail the practice and not permit it to be so extensive. *The Five Per Cent Case*, 31 I. C. C. 351, 410.

If the practice had been considered by the Commission unlawful, it could easily have so held, and it would have been the duty to so hold, and there would have directly connected revenues which it merely "recommended" might be conserved by a voluntary restriction of the practice by the carriers. In that case, at page 410, the Commission says:

> "The practice of granting free transportation of passengers and private cars, although less general than formerly, in part because of prohibitory legislation upon that subject, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by the carriers."

The "prohibitory legislation" here referred to is undoubtedly that restricting the free carriage of persons, as there has been no other.

From the publication of the record in this case as a Senate Document, it will be observed not only

that the Commission knew of the practice and failed to declare it unlawful—in effect accepting it as lawful—but that *Congress itself knew of the practice*.

In respect to the Commission's attitude regarding the practice, as indicated by the foregoing, we are also enlightened by the Commission's express announcements. It has deliberately expressed itself in a way that cannot be mistaken, both in Conference Rulings and in its "Regulations to Govern the Forms and Recording of Passes."

In the aspect of the case now being considered, it is important to determine what is included in the free passes and free transportation which the law permits to be given and what the Commission has, in its administration of the law, considered and treated as so included.

Manifestly, the free carriage of persons does not authorize only the free carriage of their naked persons. It contemplates the free carriage of persons with property on their backs and in their baggage. Clothing and baggage are property and, notwithstanding this, may, by universal concession, be lawfully carried as a part of the free transportation which the law permits. Accordingly, the question presented in this aspect of the case is, how far free transportation of persons may be extended lawfully to include things incidental to such carriage although they may be, in a sense, property.

Inasmuch as there is no limitation imposed by the law upon the kind of transportation that can be furnished free, it seems clear that anything

that properly may be used and is used as a part of that transportation may be carried free. The permission may be for free travel for a person alone, or for a person and his baggage, or for a person to be transported in any vehicle appropriate for the purpose. This has been fully recognized in the Conference Rulings of the Commission itself, made after the change in 1906 of the wording of the law in respect to free carriage and since continued in force until after the report in this proceeding. In these Conference Rulings there is a provision, paragraph (c) of Ruling 95, reading as follows (R. 116):

> "Every pass to an officer or employee of a carrier other than the one issuing the pass shall indicate the name and rank of the person to, or on behalf of, whom such pass is issued, *as well as the name of the carrier employing him.*"

The corresponding provision of the Pass Regulations, paragraph (d) of Regulation 17, is as follows (R. 61):

> "A pass for an officer or employee of a carrier other than the carrier issuing the pass must show the title or occupation of the person to whom the pass is issued *and the name of the carrier by which employed.*"

So that, to comply with the Commission's ruling and with its Pass Regulations, a pass issued by one carrier to an officer or an employee of another must state on its face the name of the carrier employing such officer or employee. This is

not true, under the Commission's rules, when a carrier issues a pass in favor of one of its own officers or employees, as will appear from paragraph (a) of section 17 of the Regulations Governing the Forms and Recording of Passes, issued by the Commission, effective January 1, 1917, which reads as follows (R. 61):

> "A pass for an officer or employee of the carrier issuing the pass must show the title or occupation of the person to whom it is issued, e. g.,
>
> "Pass John Smith, account of brakeman."

Thus a pass for an officer or employee of the carrier issuing the pass need not show the name of the carrier by which employed. A pass in this form indicates that it is a pass for an officer or employee of the carrier issuing the pass.

On the other hand, as above stated, these Regulations, as to passes issued by one carrier in favor of an officer or employee of another, reiterate the requirement of paragraph (e) of Ruling 95 of the Conference Rulings above referred to, paragraph (d) of section 17 of the Regulations reading as follows (R. 61):

> "A pass for an officer or employee of a carrier other than the carrier issuing the pass must show the title or occupation of the person to whom the pass is issued *and the name of the carrier by which employed,* e. g.,
>
> "Pass John Smith, account of brakeman, A. & B. R. R."

Bearing in mind these requirements as to the form of passes when issued by a company to one

of its own employees, and the form required when issued to an officer or employee of another railroad, in the former the name of the railroad on which employed not being used, while in the latter the name of such employing railroad being necessary, we find in the Conference Ruling above alluded to that the form of pass set out by the Commission as one which in express terms it says *would be recognized by the Commission as legal* when the pass is issued by a carrier in favor of an officer or employee of another line, is as follows (R. 115):

> "Pass John Smith, President, *car,* and five officers and employees of the X. Y. Z. Ry."

The same form of pass is recognized by the Commission as lawful in section 15 of its Pass Regulations, where it is made to read (R. 60):

> "Pass John Smith, *car,* and five officers and employees. Account President, officers, and employees of X. Y. Z. Ry."

This is a clear and an express recognition by the Commission of the practice and of the legality of a carrier's hauling free of charge a foreign car when occupied by a person or persons entitled to use, and using, free transportation.

It will be noted that the Pass Regulations just referred to were promulgated by the Commission on January 1, 1917, which was *after* the practice of one carrier's hauling the car of another carrier free when occupied by a person entitled to use, and using, free transportation had been expressly

brought to its attention, as above shown, in the *Tap Line Case*, in the *Colorado Free Pass Investigation*, and in the *Five Per Cent Case*, to which in detail attention has hereinbefore been invited. It seems appropriate to go into this detail because the Commission in its report, at page 790, endeavors to escape the effect of its action in its Conference Rulings and in its Pass Regulations by saying (R. 37):

> "Under these circumstances we think that the pass form should be given a construction in harmony with the law."

In other words, in the Commission's view it should be construed, notwithstanding the language used by the Commission as above quoted clearly and unmistakably declares the contrary, as not referring to the moving by one company of the business car of another. This is because the Commission is here attempting to declare that construction as not "in harmony with the law," and accordingly, in order to escape that consequence and in defiance of its obvious meaning, the Pass Regulations and the Conference Rulings must be construed to mean the moving by a company of its own business car, the exact opposite of what they expressly say.

No such interpretation of the Commission's Rulings or Regulations is possible or permissible.

Pursuing this subject further, attention is called to the fact that Regulation No. 2 of the issue of 1917, now in force, and in force for many years in the past, includes among the general classes of

passes that the Commission states may be issued, the following (R. 57):

> "(d) Annual or term passes for passage, including meals and sleeping parlor, and other accommodations.
>
> "(e) Trip passes for passage, including meals and sleeping parlor, and other accommodations."

The Commission does not undertake to make any restriction upon what these other accommodations may be. It was evidently of opinion that any appropriate accommodations may be lawfully given free to a person entitled to use, and using, free transportation. And this is made certain by the subsequent clause in the same Pass Regulation, heretofore quoted, reading as follows (R. 60):

> "Pass John Smith, President, car, and five officers and employees of the N. Y. Z. Ry."

It seems obvious that the Commission cannot escape the results of its deliberate acts, extending over a period of years, in which the lawfulness of this practice is recognized, by now saying that all that it has previously said must be construed to relate to the moving by a carrier of its own business car, and that this must be done because that is the only thing that the law will permit. The question here is what the law will permit. And as bearing on this subject the uniform conduct of that branch of the government which administers the law, in construing it over a long period of years, would have great weight even in a doubtful case as to what the true construction is. But it is

submitted that in this case the construction insisted on by the appellants is not even doubtful.

It is not without significance in this connection that Form 17, prescribed by the Pass Regulations of 1917 (R. 87) for a request by one carrier on another for annual or term passes, prescribes that, in a blank left under one of the columns of the request, headed Remarks, "shall be shown the character of any accommodations requested, other than passage." This without any limitation in respect to what the accommodations may be, and the word is broad enough to include the then well known method of accommodations in a business car of a foreign line.

So that it seems abundantly clear that free transportation as permitted under the Interstate Commerce Act, properly construed, and also, as expressly construed by the Commission, is not limited as to the character of the accommodations, but may include any appropriate means or character of transportation, even transportation in an official car, whether owned by the carrier performing the service or by a foreign line. This, as stated, is distinctly recognized not only by every implication of the Regulations and of the Conference Rulings, but in express terms by the Conference Rulings and Pass Regulations above quoted, which mention in terms a car of another line among the things which may be carried free as a part of free transportation, and which were promulgated with full knowledge of the practice referred to and after that practice had been pointedly called to its attention in a number of cases,

in all of which it refrained from declaring the practice unlawful, as it would have been its duty to do, if it had thought so.

It is obvious that the Commission, throughout its administration of this law as above indicated, has considered and has treated the movement of the car of another line, when used for the purpose of transporting a person entitled to use and using free transportation, as an incident of such free transportation.

It is accordingly respectfully submitted, as heretofore shown, that a private or business car belonging to a foreign line may be lawfully carried free not only as a means of honoring its own contract for free carriage of a passenger, but also as an incident of the free transportation of persons which the law permits.

(b) *Construction of a Statute by an Administrative Body Always Entitled to Great Weight, and, Unless Clearly Wrong, to Determining Weight*

Section 6 of the Act (the tariff section) plainly applies, as we think, to an ordinary shipment of property, which is substantially different from the transaction here under discussion; but if we assume the law to be doubtful in meaning, which is the most the appellees can hope for, then we invoke the familiar rule of law that the construction of a statute by an administrative body is always entitled to great weight, and unless clearly wrong, to determining weight.

The uniform and long-continued construction of

the law to the foregoing effect by the Commission charged with the duty of administering it would be accepted by the courts as a proper construction, even if that construction were doubtful.

The court below holds (R. 106) that the Act, in the respect here being considered is *clear and unambiguous;* in other words, that it is not doubtful. It is difficult to see how it can be considered, by persons opposing the appellants' view, that any more can be claimed for it than that the construction is doubtful, in view of the uniform construction of it by the Commission and of the carriers for 42 years, which construction was directly contrary to the construction put upon it by the court below.

The rule of construction above stated is so familiar as to hardly need discussion of authorities beyond the citation of a few for convenience.

The latest case upon the question is the decision of Chief Justice Taft in the case of *Wisconsin v. Illinois*, 278 U. S. 367, 413 (1929). The question there presented was the proper interpretation of an Act of Congress, section 10 of its Act of March 3, 1899, which prohibited the creation of an obstruction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States. This was construed as authorizing the Secretary of War, upon recommendation of the Chief of Engineers, to determine what obstructions could be placed in the navigable waters. It was contended that this construction was erroneous and that only Congress could make the determination. It seems that the construction

just mentioned had been acted upon by the government officials continuously from a short time after the passage of the Act. Accordingly, this practical construction, because used by the War Department for a long time, was accepted by this Court as the true construction of the statute, the Chief Justice, at page 413, saying:

> "This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. *Nothing is more convincing in interpretation of a doubtful or ambiguous statute. United States v. Minnesota*, 270 U. S. 181, 205; *Swending v. Washington Water Power Co.*, 265 U. S. 322, 331; *Kern River Co. v. United States*, 257 U. S. 147, 154; *United States v. Burlington & Missouri River R. R.*, 98 U. S. 334, 341; *United States v. Hammers*, 221 U. S. 220, 228; *Logan v. Davis*, 233 U. S. 613, 627."

We have heretofore shown the long continued and uniform construction of the Interstate Commerce Act by both the Interstate Commerce Commission and the carriers, to be that the handling by one railroad of another's office car, when appropriately occupied, is lawful and proper.

So much for a construction by the governmental authority charged with the administration of law. The courts, however, have gone farther and held that the construction by the carriers is also of great weight. A notable instance of this is the case of *United States v. Erie R. R.*, 236 U. S. 270. This case involved the pass provisions of the Interstate Commerce Act under which the Commis-

sion had made a ruling that passes could not lawfully be issued in favor of officers or employees of carriers not subject to the Act—officers of transatlantic steamship lines. It appeared that the Commission had made a Conference Ruling to the effect that these persons were not entitled to receive passes, but that ruling was never insisted upon and the carriers continued the practice of issuing such transportation. When, however, the question finally came up for determination in the case cited, the Commission insisted that its Conference Ruling was an interpretation of the Act which should have great weight with the Court. Concerning this the Court, page 270, said:

> "Counsel invoke a line of cases which decide, it is contended, that a contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it is entitled to weight, and, unless clearly wrong, to determining weight. The cases are familiar, the doctrine they announce a useful one, and we are brought to the inquiry, Does it apply in the case at bar?"

The Court, however, refused to apply the rule in that case because it had never been enforced, whereas the custom of the carriers had been uniformly the other way. The Court said at page 270:

> "But these rulings were never enforced and the custom of carriers was uniformly the other way. Against a mere verbal construction, therefore, permitted to languish in inactivity, we have the unopposed practice of the companies."

The Court thereupon considered the question and, on the law, found that the Commission was clearly wrong in its interpretation. This unopposed practice of the companies was followed by this Court even in a case where the Commission had ruled the other way. How much more certainly will the courts follow a practice which has been universal on the part of the carriers and which has, over a long period of time, been approved in express terms by the Commission.

**4 The Reenactment of the Statute by Congress Without Change After This Course of Long Continued Construction by the Commission, Reads the Construction Into the Statute**

In addition to amending several times these sections of the Interstate Commerce Act without negativing this construction, Congress in 1926 reenacted the entire Act. It thus adopted and "read into" the Act the Commission's long continued interpretation of it.

In *United States v. Hermanos y Compania*, 209 U. S. 339, this Court said:

> "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson v. Downing*, 127 U. S. 607; *United States v. Healey*, 160 U. S. 136. And we have decided that the *reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. United States v. Falk*, 204 U. S. 143, 152."

See also the case of *National Lead Co. v. United States*, 252 U. S., page 146, where the Court says:

> "The reenacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to *an implied legislative recognition and approval of the executive construction of the statute*, *United States v. Philbrick*, *supra*; *United States v. G. Falk & Brother*, 204 U. S. 143, 152; *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337; for Congress is *presumed to have legislated with knowledge of such an established usage of an executive department of the Government*. *United States v. Bailey*, 9 Pet. 238, 256."

The list of authorities might be extended indefinitely to show that where Congress reenacts a law, to which a well known and long continued construction has been given by the branch of the government charged with its administration, the legal effect would be the express adoption by Congress of the long continued administrative interpretation. Reference may be made to the following cases:

*Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization*, 206 U. S. 474.

*Nagle v. Loi Hoa*, 274 U. S. 475.

*Norfolk Southern R. R. Co. v. Chatman*, 244 U. S. 276.

*United States v. Falk*, 204 U. S. 143.

In the case of *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, the Court says, at page 401:

> ". . . we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, *must be treated as read into the statute.*"

It follows from the cases cited that Congress has adopted and approved the long continued construction of this Act given by the Interstate Commerce Commission; and this, apart from all other considerations, would, it is respectfully submitted, be conclusive of the case.

For Congress in the Transportation Act, 1920, restudied the whole Interstate Commerce Act and amended it without changing the provisions here involved, and in the Codification Act of 1926 reenacted the pass provisions of the Interstate Commerce Act—all after the long and well known construction given them by the Commission.

In this case, it is interesting to note that the prevalence of the practice was expressly made known to Congress by the *Five Per Cent Case, supra*, the record of which was printed, as we have seen, as a Senate Document (R. 119).

The report, in reaching the conclusion that, because a private or business car is physical property, it must be handled as an article of commerce under a tariff and charged for as freight, loses sight of three fundamental and well established canons of transportation and of law.

(a) That a private or business car, although physical property, may be handled as a facility or instrumentality of commerce, in contradistinction from an article of freight that is shipped, in which event it is not shipped as property, is not subject to a tariff, has been made the carrier's own car by its using it in the performance of its transportation service and need not be charged for;

(b) That the handling of such a car without charge, when used as part of lawful free transportation of a person, is in itself, and has from the beginning been recognized by the Commission as, entirely lawful both for the reason above given in (a) and also because it is an appropriate incident of the free transportation which the law permits;

(c) That by the reenactment of the pass provisions of the Interstate Commerce Act by Congress after this long continued and well known construction of the law by the Commission acting in its administrative capacity, Congress has expressly adopted and ratified this construction and "read it into the statute."

## III

## THE MOVEMENT DOES NOT VIOLATE THE DISCRIMINATION PROVISIONS OF THE INTERSTATE COMMERCE ACT

It should be here repeated that neither the appellants here are, nor were they as the petitioners below, attacking in this suit the Commission's finding, stated in paragraph No. 3 above quoted, namely, that it amounts to unlawful discrimination to transport *pay* passengers in private cars, furnishing them therein berths and other accommodations, at the same rate charged *pay* passengers provided with only ordinary coach accommodations. The only form of unjust discrimination which the Commission found other than that just mentioned, and consequently the only one here involved, is stated by the Commission in its paragraph No. 2, as follows:

> "That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately-owned or chartered cars."

It will be observed that neither in finding No. 3 (which for the purposes of this case is not contested but accepted) nor in finding No. 2, just quoted, is there any finding by the Commission of unjust discrimination as between the *passholder* and the *pay passenger*—the alleged discrimination upon which the lower court rested its decision.

The last mentioned form of discrimination, as to which the Commission made no finding, is, for

the reasons and on the authorities hereinafter cited at pp. 82-84, not in the case.

The only issue as to unjust discrimination here presented is whether the hauling of private or business cars of other carriers free, while imposing a tariff charge on the movement of privately owned or chartered cars, constitutes unjust discrimination as held by the Commission.

While the Commission must find unjust discrimination before the question can be considered by a court, yet it is well established that the courts will review and reverse the Commission's finding if it is not supported by the evidence.

*New England Divisions Case,* 261 U. S. 184, 203.

*Manufacturers Ry Co. v. United States,* 246 U. S. 481.

*Florida East Coast Ry. Co. v. United States,* 234 U. S. 185.

*Pennsylvania Co. v. United States,* 236 U. S. 361.

*Phila. & Reading R. R. Co. v. United States, etc.,* 240 U. S. 334.

*I. C. C. v. Louisville & Nashville R. R. Co.,* 227 U. S. 91.

From the syllabus of the last mentioned case, page 88, the following is taken:

> "A finding without evidence is arbitrary and useless," (baseless) "and an act of Congress granting authority to any body to make a finding without evidence would be inconsistent with justice and an exercise of arbi-

trary power condemned by the Constitution."

"... if the finding is indisputably contrary to the evidence; or if the facts found do not, as matter of law, support the order made" the order is void.

In the text of the decision, at page 92, this Court says:

"A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'"

At page 93 this Court says:

"In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding."

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

*B. & O. R. R. v. U. S.*, 264 U. S. 265.

The list of authorities to the foregoing effect might be extended indefinitely. They state principles of law which are well understood and universally accepted. There must be sufficient evidence in the record to support the finding of the Commission; otherwise the finding is void.

The only fact which the record discloses as to the alleged unjust discrimination created by the handling free, by one carrier of the business cars of another, while a charge is made for the hauling of private cars, otherwise privately owned or chartered, is that in the former case they are hauled free and in the latter case a charge is imposed.

An inspection of the report of the Commission (R. 127) and of the condensation of the evidence (R. 117) will confirm this statement and will show that the Commission had before it *no evidence or fact bearing on the subject except that there existed the above mentioned difference in treatment.*

There was no evidence whatever to show that the difference was unjust or constituted an undue or unreasonable preference or advantage in favor of the carrier-owned car.

In this connection it must be remembered that

> "It is not all discriminations or preferences that fall within the inhibition of the statutes; only such as are unjust and unreasonable . . . Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."
>
> *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S. 276-7.

In Judson on Interstate Commerce (Third Edition), page 338, appears the following statement in respect to the provisions of section 2 of the Act:

> "discriminations are 'unjust' and violative of this section: *First*, when the service is like and contemporaneous; *second*, when it is rendered in the transportation of a like kind of traffic, and, *third*, when the service is rendered under substantially similar circumstances and conditions. That is, all three of these conditions must concur."

**There Is No Unjust Discrimination Nor Undue Prejudice or Advantage Here Involved:**

(a) *Because, if it is lawful under the statute to move the carrier-owned car free, the statutory provisions which permit it would "limit, or define, the requirement of equality of treatment which is imposed in other sections of the Act"* (Nashville Case, 262 U. S. 363) *even if they would be otherwise broad enough to cover; and no unlawful discriminatory conditions can arise, from a mere difference in treatment which the law permits, in the absence of an affirmative showing that the lawful act is being used to accomplish an unlawful purpose or result.*

Of course, if the Court should hold, as the Commission has held in paragraph 1 of its holdings hereinbefore quoted, that the movement free of the carrier-owned car is prohibited by the Act and is consequently in itself unlawful, then, of course, that is the end of the case.

But if the Court should hold, in accordance with the contentions of the appellants, that such free movement, when the car is occupied by a person or persons lawfully entitled to use, and using, free transportation, is not prohibited by the Act and is therefore in itself lawful, it necessarily follows that the basis for a claim of unjust discrimination or undue prejudice or advantage is destroyed (as no unlawful discrimination, prejudice or advantage can exist in respect to an act made lawful by the statute) unless there is an affirmative showing that the lawful act, in the particular case, is being used to accomplish an unlawful purpose. In other words, if the Act permits the movement free of office or private cars when occupied by a person or persons lawfully entitled to use, and using, free transportation, the Act thereby creates an exception and takes such lawful movement out of the discriminatory provisions of the Act, and out of the field of unlawful discrimination, prejudice or advantage, in the absence of the affirmative showing above indicated. That there was no evidence whatever before the Commission making, or bearing upon, such affirmative showing, will, as above stated, appear from an inspection of the record (R. 117).

An illustration of such an affirmative showing is furnished by the case of *Nashville, Chattanooga & Saint Louis Railway v. Tennessee*, 262 U. S. 318.

In that case this Court had before it the question of whether or not certain rates fixed by the State of Tennessee unlawfully discriminated against interstate commerce. The court said:

"Whether this section" (referring to section 22 of the Interstate Commerce Act) "should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision."

In this case it appeared that the Commission had, under the Transportation Act, authorized a general increase throughout Southern Territory of 25 per cent on interstate freight rates. The State of Tennessee made a like increase on certain intrastate rates, but undertook to except, from this increase, rates on certain road materials when consigned to Federal, State, county or municipal authorities. The carriers at once saw that this would give an enormous advantage to quarries within the States, as against quarries situated over the line in other States, as the latter would be forced to pay the higher interstate rates. They accordingly applied to the Commission for an order requiring the Tennessee commission to increase these state rates to the level of the interstate rates and thus prevent a clear discrimination against interstate commerce. Paragraph (4) of section 13 of the Interstate Commerce Act gives authority for such action to the Interstate Commerce Commission in respect to the rate orders of a State commission. The discrimination being obvious and it being clear that, under section 13 (4) of the Interstate Commerce Act, it was within the power of the Interstate Commerce Commission to remove it by increasing the State

rates, the Interstate Commerce Commission found that unlawful discrimination did exist and entered an order requiring the increase of the State rates so as to remove the discrimination. The State commission filed its suit attacking the validity of the order, and the lower court held the order to be void. The contention of the State Commission was that, under Section 22 of the Act, railroads were expressly permitted by law to transport property free or at reduced rates for the United States, State and municipal governments and for charitable purposes, etc.

This Court held that, although it was lawful for a carrier to give reduced rates to the United States, State and municipal governments, this could not be done if the lawful act of giving the reduced rates had the effect of creating an undue, unjust and unlawful discrimination against other shippers, and the power expressly given to the Commission by section 13 (4) of the Act came into play and empowered the Commission to prevent it. This it did because there was a glaring discrimination between shippers of the same class, one within and the other without the State, due to the shippers within the State, with lower rates, having a great advantage over those out of the State, who had to pay higher rates, even though the quarries of both might be close to the line and call ordinarily for the same rates.

There would have been no discrimination if the rates, both interstate and intrastate, had been constructed upon the same base level. The vice of the State commission's action lay in the fact

that it brought about discrimination as between different shippers of road material, that is, between shippers of the same class, and hence was unlawful discrimination against interstate commerce.

In reality the case did not come within section 22 of the Act, because the carrier not only had not exercised discretion to carry at lower rates for the government, but in the case was attacking the order of the Tennessee commission requiring it to do so. But, even if it had exercised such privilege and the section thus had become operative, this Court indicated that if the facts in the case showed that this discretion of the carrier was being exercised *to promote an unlawful purpose* it could not stand. Of course, a perfectly legal act may be used for such an unlawful purpose as to render the use of the legal act in that connection unlawful. It is lawful for a carrier to spend its own money, but it cannot spend it for an unlawful purpose, such as to give rebates to some of its patrons.

This principle is also illustrated in the *Tap Line Case,* where, although it is lawful to issue a free pass, the Commission held it was not lawful to issue it to a person engaged in business to be used so as to give a substantial and unlawful advantage over a competitor to a person or industry engaged in a commercial business. And so, in the *Nashville, Chattanooga & Saint Louis Case* above mentioned, if the carrier were to enter into a combination with a quarry furnishing stone to the government and in competition with another quarry competing for the same government business, and were

to attempt to use the discretion of a lower rate to the government for the purpose of throwing all of the business to the favored quarry or to enable it to sell at a higher net profit than the other, the perfectly lawful act of carrying at a lower rate for the government would become so associated with an unlwaful purpose as to be itself unlawful. This, however, in no way militates against the contention of the appellants that, as to any lawful use, the Act excepts from its discrimination provisions the granting of such free transportation as the Act permits.

It must also be borne in mind that the Commission and the Court in the *Nashville Case* were dealing with a commercial transaction. Under section 22 it would have been the right of the carrier to prefer a governmental agency; but it is not the right of the carrier, in extending this preference, to destroy the business of one selling a given material, by giving a preference to his competitor. This was the viewpoint of the Court when it indicated, on page 323, that it is entirely proper to grant a lower rate so that the government may benefit, provided no person or class of traffic is thereby unduly prejudiced. It is pointed out that the discrimination becomes undue and unlawful when the effect is to give the government business to a quarry within the State, while denying quarries without the State the right to compete.

The case at bar, however, does not deal with commercial transactions. It has no competitive feature whatever. The railroad officer using an office car is not in competition with a revenue pas-

senger using his own car. The revenue passenger is not injured at all by reason of the fact that the railroad officer travels in an office car. The commercial, and therefore, the competitive, element is entirely lacking. Stated in another way, the alleged discrimination is not *between members of the same class.*

The public is divided by the Act in two classes, revenue passengers and pass passengers, and difference in the treatment of these two separate classes, in respect to the movement of the cars which they occupy, cannot in itself constitute unlawful discrimination.

Bearing on this subject, this Court, in *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S., at page 282, quoted with approval the following:

> "To come within the inhibition of said sections," (referring to sections 2 and 3 of the Act) "the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

Congress, for reasons satisfactory to itself, the wisdom of which cannot be here inquired into, saw fit to divide the public into two distinct classes, and declared as to the one that the carriers may transport them free of charge, but that all the rest of the public, constituting the other class, must pay certain fixed fares definitely prescribed in tariffs promulgated by the carrier and filed with the Commission. This difference thus created by Congress constitutes a discrimination, but it is a lawful discrimination. That this is the meaning of the Act is definitely declared in the *Nashville Case,* where the Court, after drawing the distinction between the use of free or reduced transportation for a lawful purpose and for an unlawful purpose, specifically states that the object of the statute is to permit *"the preferential treatment of certain classes of shippers and travelers."* Particular attention is called to the Court's clear statement of this principle at page 323:

> "Section 22 must in this matter, as in others, be read in connection *with the rest of the act,* and be *interpreted with due regard to its manifest purpose. Robinson v. Baltimore & Ohio R. R. Co.,* 222 U. S. 506, 511. Congress did not intend, by this provision concerning *reduced rates and free transportation,* to create an *instrument,* by which the carrier was authorized, in its discretion, *to subject interstate commerce to undue prejudice,* or by which the State was empowered to compel the carriers so to do. The object of the section was *to settle, beyond doubt, that the preferential treatment of certain classes of shippers*

*and travelers, in the matters therein recited is not necessarily prohibited.* And in this respect its provisions are illustrative, not exclusive. It *limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act.* By so doing, *it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases.*"

In this connection it is interesting to quote the following from the case of *Postal Telegraph Co. v. Tonopah & T. W. R. R. Co.*, 248 U. S. 471:

> "Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. *The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute.*"

In the case at bar, however, in view of Congress itself having created the discrimination between the two classes named, it is beyond the power of the Commission to hold that such discrimination is unlawful, *except when it is shown that it is being used for an unlawful purpose.* Examples of such an affirmative showing are given in the cases above cited, beginning with the Nashville case; but in this case no such affirmative showing was made or even attempted. If the Commission had the

power just referred to, it could completely annul the exceptions to the Anti-pass Act, since they necessarily bring about pronounced discriminations.

Of course, there is no possibility of transportation which the statute permits to be given free being considered in the same class as transportation for which it is necessary to impose a charge, and, as between the two, nothing that is done in favor of free transportation can be in and of itself unlawful discrimination. The Interstate Commerce Commission itself, by its Conference Rulings (Rulings 33, 208 (e), 218), recognizes that traffic carried at reduced rates under section 22 is excepted from the requirements of the Act as to the filing and observance of tariffs. And the same view is expressed in *United States v. Union Pacific R. R. Co.*, 28 I. C. C. 524.

The Commission thereby recognizes the legal effect of those portions of the statute making exceptions to the general rules, and states that these exceptions relieve the carriers of the obligations to comply with other sections of the Act.

In fact, this Court has said, in referring to section 22 of the Act (and the same principle applies to section 1):

> "*It limits, or defines, the requirement of equality of treatment which is imposed in other sections of the Act.* By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right

upon any shipper or traveler. Nor does it confer any new right upon the carrier."

*Nashville Case,* 262 U. S. 323.

If, therefore, the contention of the appellants is sound that a carrier may lawfully handle free the business car of another when occupied by a person lawfully entitled to use, and using, free transportation, and there is no evidence in the case to support the finding that the free movement of the car, lawful in itself, results in producing an unlawful result, there can be no unjust discrimination or unlawful prejudice or advantage.

(b) *Because the difference in treatment here involved does not come within the terms of the statute which forbid unjust discrimination and undue preference or advantage.*

The only two sections of the Act bearing upon undue discrimination or undue or unreasonable preference or advantage are section 2 and section 3.

**Section 2 of the Act**

This section is expressly confined to a discrimination created by *charging one shipper or passenger more than another.* But such a discrimination is by the express terms of the statute made dependent upon three definite conditions: (1) "a like and contemporaneonus service," (2) "in the transportation . . . of a like kind of traffic," (3) "under substantially similar circumstances and conditions." A reference to this Act will show that *all three of these conditions*

*must exist before the carrier can be deemed guilty of unjust discrimination* in this matter of charging different compensation for service.

Section 2 of the Act is as follows:

> "Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances, and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

As has been shown above, Judson, the leading text writer on this subject, in his work on Interstate Commerce, Third Edition, page 338, states, as is apparent from an inspection of the Act itself, that *"all three of these conditions must concur"* before unjust discrimination can be found.

Obviously this section of the Act does not apply to the case here presented, for the reason that none of the foregoing conditions, much less all, exists. The two situations are wholly dissimilar. In the case of an ordinary private car for which 25 fares

is charged, the compensation paid is primarily for passenger service, and where as many as 25 passengers are in the car (as often occurs in the case of a chartered Pullman car) nothing whatever would be paid for the car. In the case of the office car, however, there is no element of compensation for the passengers since, under the case assumed here, they are using and are entitled to use free transportation. Therefore, if a charge were made at all it would be solely for transporting the car, whereas in the other instance it is primarily and oftentimes solely for transporting the passengers. Obviously, the two situations are so entirely different that they are not comparable under the standard fixed by the statute we are discussing; that is, they do not concur in the three respects there enumerated, nor in any of them.

**Section 3 of the Act**

The only applicable part of this section is paragraph (1), which is brief and is here quoted in full:

> "Sec. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This simply impiles that there must be no dis-

crimination in the transportation of ordinary private cars; in other words, they constitute a class, all of which must be treated alike. Those movements are revenue movements and are subject to the same tariff provisions. The differences we have noted above apply here and show conclusively that the movement of a railroad office car and the ordinary private car, not being the same class, do not involve discrimination.

There is a marked difference between the conditions surrounding the two movements which are here brought into contrast, namely, the free transportation by one carrier of the car of another when occupied by a person using and lawfully entitled to use free transportation, on the one hand, and the movement of a revenue passenger in his own car, on the other. The contracts which the carrier makes in the two cases are entirely different. In the first its contract is to carry a person entitled to free transportation in some facility which it must provide; but no particular facility may be demanded. In the second case the contract is to carry a person in accordance with the carrier's tariff, namely, to carry the revenue passenger in his own car, with the right to occupy it exclusively, or to carry with him 24 friends of his own selection, and this case is definitely covered by a tariff, and the service may be demanded.

This difference in the contracts shows that there is not "a like and contemporaneous service," nor a transportation "of a like kind of traffic," nor transportation furnished "under substantially similar circumstances and conditions."

It is accordingly submitted, in view of the dis-

similarity of conditions, that the act here involved does not come within the terms of these discriminatory provisions.

## IV

## THE DECISION OF THE DISTRICT COURT ON THE SUBJECT OF DISCRIMINATION

As we have hereinbefore stated, the District Court did not uphold—in fact, made no decision with reference to—*the propositions upon which the Commission entered the orders herein complained of.* The court based its decision solely upon the proposition that regardless of anything else there was a difference in the treatment of pay passengers and pass passengers—a subject which was not even discussed, much less passed upon, by the Commission—and that this of itself constituted an undue discrimination which should be corrected by some such order as the Commission entered. It is hardly necessary to quote those passages of the court's decision which contain this holding, for it appears throughout the entire decision as the only basis found by the court for sustaining the orders, notwithstanding, as we have heretofore shown, that the Commission made no finding of any such discrimination.

As hereinbefore shown, the Commission made no findings as to unjust discrimination, etc., *as between a pass holder and a pay passenger,* and in the absence of such a finding by the Commission the court had no authority to make such a finding.

> "Whether a preference or advantage or discrimination is undue or unreasonable or

unjust is one of those questions of fact that have been confided by Congress *to the judgment and discretion of the Commission.*"

*Interstate Commerce Commission v. Alabama Midland Ry. Co.,* 168 U. S. 144, 170.

There is no jurisdiction in the court *to take initial action* in making such a finding, because, as stated in the quotation just given, such a question is "confided by Congress to the judgment and discretion of the Commission."

No jurisdiction exists in a court to take initial action in making such a finding, the court's power being confined to reviewing the Commission's finding in the light of the facts disclosed by the record.

*U. S. v. Michigan Central,* 122 Fed. 544.

*P. R. R. v. International Coal Company,* 230 U. S. 196.

*Manufacturers Ry. Co. v. United States,* 246 U. S. 481.

*S. A. L. v. United States,* 254 U. S. 62.

*Nashville C. & S. L. Ry. v. Tennessee,* 262 U. S. 318.

"The importance to the commerce of the country of the exclusive, *initial* jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated."

*Director General v. Viscose Co.,* 254 U. S. 504.

Accordingly, inasmuch as the Commission has made no finding as to unjust discrimination be-

tween the passholder and the pay passenger, no issue as to that is involved in this case and we submit that the court below, in deciding the case on that issue, is plainly in error.

Not only did the Commission make no such finding as the court below indicates, but in its report it expressly found (R. 32) that a carrier may transport its own business car without subjecting it to a tariff charge and its amended Pass Regulations expressly permitted the issue of a pass "for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier" (R. 45). This by necessary implication permitted the continued use of free transportation in a carrier's own office car and the consequent giving to a pass passenger different and better accommodations than to pay a passenger.

It may, however, be interesting to inquire why the Commission made no such finding.

Whether or not the alleged discrimination relied on by the court—that is, between pass passengers and pay passengers—is such as comes within the jurisdiction of the Commission, depends upon sections 2 and 3 of the Interstate Commerce Act, both of which have been fully discussed in the preceding section.

Noting, first, section 2, it is obvious that in the case of the pass passenger as compared with the pay passenger, the two situations are not comparable and that *not one, much less all, of the three conditions applies.* Both involve passenger transportation, but in all other respects the two are dissimilar. One is transportation under regular pas-

senger service tariffs; the other is exempt from the tariff requirements.

Neither is this the transportation of "like kind of traffic," nor is it rendered "under substantially similar circumstances and conditions," for there is involved in one the movement of a revenue passenger and in the other of a pass passenger, which are not a like kind of traffic nor are they moved under similar circumstances and conditions. They are in no sense comparable, for, as shown above, the only discrimination referred to in that statute is between traffic of the same class, that is, revenue traffic moving under tariffs which fix the charges therefor.

It is apparent that section 3, like section 2, relates only to preference and advantages or discriminations *between members of the same class,* that is, between members of the public other than free passengers. (*Interstate Commerce Commission v. B. & O. R. R.,* 145 U. S., at page 282.) This must be true because the holder of a pass, which entitles him to free transportation while others pay the tariff rates, is, of course, receiving a manifest preference. It is a clear case of discrimination, but it is a legal discrimination, because expressly authorized by the statute. If, then, the holder of a pass was meant to be included in the operation of this section 3, the law would *ipso facto* take away his pass and thus render null the other provision of the Act which authorizes the pass. Obviously, therefore, viewed from any angle, the giving of free transportation to a pass holder, however clear and definite the

preference or advantage, is not a violation of this section 3. If not, then it is because section 3 does not apply to such a case. Assuming, then, as we must, that the giving of the transportation is not unlawful, the matter is sharply narrowed to the inquiry as to whether the one entitled to such free transportation may be given accommodations better than those furnished to the ticket holder. There is no law which forbids this. There is no discrimination between ticket holders, because all of that class stand upon the same footing. They pay a certain sum, for which they receive a certain service. They are put upon an equality with each other, and no injustice, in the sense of inequality, is wrought against them by the fact that some other individual, who has free transportation, receives different or better accommodations. In other words, the two classes of passengers are not properly comparable, and therefore neither unlawful discrimination nor undue or unreasonable preference or advantage between them can exist.

It must be remembered, in connection with this question of the difference of accommodations furnished revenue passengers and those whom the Act permits to be carried free and to be given certain privileges in respect to transportation, that in making this distinction Congress did not do a mere arbitrary or unconsidered thing. The relationship of the free passenger to the railroad industry is very different from that of the ordinary revenue passenger. As a rule, the free passenger is devoting his life to the success and the

development of the railroad industry and the giving of an adequate public service; and Congress, in permitting him to be carried free, is merely recognizing this obvious difference and *establishing an inducement for men to engage in this essential industry,* the attractions of which are limited by strict, and sometimes drastic, governmental regulation.

If the person authorized to receive free transportation is not connected with the railroad industry, there were other reasons, such as passes given for charitable or relief purposes, which, in the opinion of Congress, justified it in separating him as a class from the class required to pay tariff rates.

There is nothing in the Act, nor in any court or Commission decision, which restricts a carrier in the character of accommodations which it may furnish to a free passenger. From time immemorial the carrying line, as a matter of grace, has granted or withheld lawful pass privileges at its pleasure, and has extended to the free passenger whatever character of service it saw fit. He can be transported, if the carrier so elects—and this the Commission in effect concedes in its report—in one of its own office cars, a thing which is constantly done. And, if this be true, no legal reason can be assigned why he can not be carried in an office car which he or his employer is instrumental in securing for use of the carrying line. There is no greater discrimination if he travels in the business car of a foreign line than if he travels in the business car of a home line. This freedom from unlawful

discrimination in affording facilities to free passengers is distinctly upheld by the Commission itself, for, when it modified its Pass Regulations, as hereinbefore set out, so as to forbid a carrier to transport the office car of another carrier over its line, it expressly, or by necessary implication, *reaffirmed the right of the carrier to transport such passengers in its own office cars upon its own line.* So far as the public is concerned, it is just as much an advantage or preference for a railroad to grant office car accommodations in its own cars to passengers on its own line, when pay passengers are confined to the coaches, as it would be if these passengers were in a private or business car owned by another line. There is simply no way to avoid this conclusion as necessarily following from the action of the Commission itself.

Recognizing this, the Commission wisely concluded that it could make no finding of unjust discrimination or unlawful prejudice or advantage between the pay passenger carried in the coach and the pass passenger carried in a private or business car.

It may be said that these same considerations apply to the case of discrimination which the Commission found, namely, the case of discrimination between hauling free a foreign business car occupied by a person entitled to use and using free transportation and making a charge for a pay passenger occupying a car otherwise privately owned. We agree with this view and think that undoubtedly the Commission should have re-

frained in the latter case as in the former from undertaking to find unjust discrimination.

## V

## CONCLUSION

For the reasons hereinbefore given, it is respectfully submitted that the Commission's orders in this case are based on an erroneous conception of the law and should be set aside on the grounds:

1. That it is lawful, and not unlawful as the Commission declares, for a carrier to select its own facilities and instrumentalities of performing its transportation service, even if that service is furnished free as permitted by the statute, and to procure such facilities or instrumentalities in any way and on any terms it may adopt. Having so secured them and devoted them to the use of rendering such service, the cars become its own for the purpose of the service, do not constitute property which is shipped subject to a tariff, and it is not unlawful to move such cars free.

2. That the movement by a carrier of the car of another, when occupied by a person using and entitled to use free transportation and for the purpose of rendering its transportation service, is an incident of such free transportation to the person, and hence lawful, and not unlawful as the Commission declares.

3. That after the Commission, in its administration of the statute, has over a long and uninterrupted period of time, construed the statute as per-

mitting the free movement of such car of another company when occupied by a person lawfully using free transportation and as a means of performing the transportation service, the courts will give to this administrative construction, unless clearly wrong, determining weight and will adopt it as the proper construction of the statute. This long continued interpretation of the Commission is not only not clearly wrong but, we submit, is clearly right, as appears from the considerations hereinbefore set forth.

4. That after the Commission, in its administration of the statute, has over a long and uninterrupted period of time, construed it as permitting the free movement of such car of another company when occupied by a person lawfully using free transportation and as a means of performing the transportation service, Congress, by reenacting the law, has expressly adopted the construction so declared by the Commission, and the free movement of the car under the circumstances referred to is now expressly permitted by the statute.

5. That, under the circumstances hereinbefore shown, it is not unjustly discriminatory and not unduly preferential and prejudicial to haul the private or business cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars, when such carrier-owned cars are used to perform a transportation service, which the moving carrier

is under contract to perform, as in the case of such car being occupied by a person lawfully entitled to use, and using, free transportation.

Respectfully submitted,

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Washington, D. C.
December 15, 1930.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930

**No. 333**

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & SAINT LOUIS RAILWAY COMPANY, who sue, etc.,

*Appellants,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Appellees.*

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY**

## REPLY BRIEF FOR APPELLANTS

EDWARD S. JOUETT,
R. V. FLETCHER,
JOHN J. CORNWELL,
ROBERT B. TUNSTALL,
H. N. QUIGLEY,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & SAINT LOUIS RAILWAY COMPANY, who sue, etc.,
*Appellants,*

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
*Appellees.*

No. 333.

---

**Appeal from the District Court of the United States for the Western District of Kentucky**

---

## REPLY BRIEF FOR APPELLANTS

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A detailed reply to the various contentions of appellees' brief would involve a repetition of much of our original brief, to which appellees' brief is their answer. We shall, therefore, call attention only in a general way to what we conceive to be the outstanding fallacies of the appellees' various positions. They rely upon four propositions which may be summarized briefly thus:

(1) That the movement in question is the *shipment of property* for which a tariff must be filed and charges made.

(2) That if not this, it is an *unlawful discrimination* because one not a railroad company that owns a private car must pay a tariff charge of 25 fares.

(3) That it is an unlawful *discrimination between pay passengers and pass passengers* for the latter to have a better class of service than the former.

(4) That "neither the Commission nor Congress has sanctioned the practice of transporting free the private or office cars of other carriers."

In the discussion of these four points by appellees there has been some overlapping. It is better, however, in the interest of clarity of thinking, to consider them separately, as they are obviously distinct from each other.

## I

## IS THIS A PROPERTY SHIPMENT?

At the outset we submit that question No. 1, stated in appellees' brief at page 2, is not accurate. Appellants do not claim that the statutory provision giving the carriers the right to grant personal passes of itself permits the free carriage of an office car. Our claim is that in view of the free pass provision, the other statutes, namely, those relating to tariffs and discrimination, do not forbid the free transportation of an office car when

occupied by pass holders. With this explanation, much of the appellees' brief on this subject is irrelevant.

Considerable space is consumed by appellees in the discussion of a proposition which we do not contest, namely, that if this is a property shipment in the ordinary meaning of the term as used in the statute, then a tariff should have been filed and a charge made. We freely admitted this in the original brief, and stated that if the court holds to this view that ends the case. We respectfully insist, however, that the practice of the appellants with reference to the movement of railroad office cars is very different from the shipment of property. If so, then it does not come within the inhibition of the statute. Appellees claim that the transaction under discussion is a mere shipment of property as freight on two theories: (1) that it is analogous to the shipment of a car from a factory or from a repair shop; and (2) that it is analogous to the handling of an individual private car for 25 fares.

## 1. The Ordinary Shipment of a Car Is Entirely Different

In the case of one railroad transporting for another a new car from the factory or an old car from a place of repair, the transaction is rightly treated as a shipment of freight, for which there are tariffs prescribing the proper charges. It obviously has the usual elements of an ordinary *property shipment*.

One of these is the fact that all cars thus offered for shipment must be transported by the carrying line; it has no choice in the matter. Another is that the car is empty and not serving as any sort of transportation facility. A third is that such a movement is made in a freight train. None of these, the constituent elements of a shipment of freight, inhere in the office car practice involved in this proceeding.

(1) In the case at bar the carrying line need not transport the office car of another railroad unless it chooses to do so; it is purely a matter of choice. It may grant or decline the request at its pleasure, and, of course, in reaching its conclusion it may take into consideration any facts deemed relevant, such, for example, as its need of such equipment for the purpose of transporting these pass passengers, or its expectation to receive a like service in return, or the particular business relations with the owning line.

(2) Furthermore, the car is definitely used for performing a transportation service, for it carries a passenger or a number of passengers, who are none the less passengers because they hold free transportation. The obligation to carry these is one which, by express permission of the statute, it is authorized to assume. In order to meet this obligation it must furnish the facility necessary to transport such pass-holding persons, whether railroad officials or their families, or both. At this juncture the owning line offers to furnish the necessary equipment for carrying these passengers. There may be many of them, so that the use

of the car thus furnished might easily be of greater value than the mere cost of hauling it. That detail, however, is not important in determining the legal question as to whether the carrying line's movement of the car thus placed in its passenger train, and carrying passengers, is the same as the ordinary shipment of an empty car for which, under the statute, a charge must be made. There is no statutory requirement as to rental or other consideration. It is sufficient that the consideration for this carrying arrangement is satisfactory to the parties, provided the agreement is in good faith, and this is not questioned anywhere in the record.

(3) In the ordinary shipment of a car it is handled as *freight* in a *freight train;* whereas the movement here complained of is a *passenger* movement handled in a *passenger train.* This distinction between the two conditions is a clear one.

Obviously the movement of an empty passenger car in a *freight train* as a freight shipment is so different from the movement of a passenger car in a *passenger train* when *occupied by passengers* that a statute strictly applying to the former cannot by mere analogy be made to apply to the latter.

(4) The true status of the office car in the practice under consideration is that of a transportation facility in use as such. A car, being a physical thing of value, is of course *property* in the broad sense of that term, but the Commission (R. 32-34) and counsel admit that cars of one carrier are frequently transported by another carrier *without*

*being considered property for which freight charges must be paid,* the distinguishing feature being that if the carrying line gets transportation service from the movement, the car thus becomes (as stated by the Commission in *Furnas Ice Cream Co. v. Norfolk & Western Ry. Co.,* 157 I. C. C. 617) not "an *article* of commerce, but rather as an *instrument* of commerce." That is just what occurs here. The carrying line, moreover, by using it as such, is relieved of furnishing equipment for the transportation of those who occupy the office car. There are always a number of these passengers, the official usually having his secretary, his assistant, and often the heads of departments, experts, etc.; or he may be taking a vacation trip with his wife, dependent children and servants—a perfectly legitimate thing, which is so recognized and authorized by Congress. In either case the facility—the office car furnished by the owning line and accepted by the carrying line—is taken into the latter's passenger train, becomes *its own* under the law as repeatedly declared by the courts (our Br. p. 24), and serves to leave to the carrying line the use of space in its own equipment which but for this arrangement would be occupied by these passengers. While it is primarily for the greater convenience of the owning line's officials, it is none the less a facility used by the carrying line for transporting some of its passengers.

To illustrate the soundness of this position, take the case, say, of a group of Louisville & Nashville employes going, as often happens, from Louisville, Ky., to French Lick Springs, Ind., on a Saturday

afternoon to spend the week-end at this popular resort. It is a day run of about two hours. The passengers number 25 or 30—enough to reasonably fill a coach—and all have passes. Can it be contended, where the Louisville & Nashville furnishes a coach for carrying these persons and thus saves the Monon Railroad from furnishing its own car, that it should pay the Monon a tariff charge of 25 fares for moving the car under those circumstances? Aside from such a contention being utterly unreasonable, neither the Commission nor its counsel in this case present either statute or precedent to support it. Yet the case at bar is identical in principle, the difference being only one of degree.

The correctness of our position may be tested by another simple illustration. Suppose a carrier purchases a passenger car in Chicago for delivery at Louisville over the Pennsylvania Railroad. This would be a freight shipment carried in a *freight train*. For it there is a tariff and the Pennsylvania would have to charge the regular rate; not to do so would be a violation of the tariff and also the statute against discrimination if a charge is made in a similar case. But if the Pennsylvania chooses to put this car in its service in a *passenger train* from Chicago to Louisville, it can do so on whatever terms may be agreed upon between it and the owner of the car. Furthermore, it can do this for one company and decline to do it for the other, without violating any law, for the reason (as shown fully in our original brief, p. 17) that while Congress has given the Commission con-

trol over the interchange of *freight cars* between carriers (Section 1, paragraph 10 of the Interstate Commerce Act), it has withheld all such authority in the case of *passenger equipment*. This proposition, asserted and proven in our original brief, is not controverted in appellees' brief. And in the illustration given it is immaterial whether a fixed rental be paid by the Pennsylvania or it take chances on the revenue derived from the car being sufficient to justify the movement. Its acquiring this passenger equipment and placing it in its passenger train is solely "*a matter of private contract*," as clearly appears from the decisions of the Commission itself quoted in our original brief at the pages just indicated.

This distinction has been repeatedly recognized by the Commission itself, as for example in *Pacific Engineering & Construction Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 1 I. C. C. 340, where, in discussing this difference between cars as *articles of commerce* and as *instrumentalities of commerce*, the Commission said:

> "While it is the duty of all common carriers subject to the act to furnish suitable and adequate facilities for all reasonable necessities of the business in which they engage, the law at present leaves to carriers their own appropriate means of carriage. We consider [illegible] that are not common carriers of cars of their own, or perhaps employed solely as instruments of carriage, and may decline to accept them for such purposes in lieu of their own, although hired

*to accept them when offered merely as articles to be transported.*"

In the *Worcester Excursion Car Case*, *Penn. R. R. v. Pitcairn* (1894) the leading case involving the status of passenger cars, uniformly followed ever since, the Commission said:

> "The statute has not relieved railroad companies from the duty of providing their own equipment, nor changed the method of providing it. They may do it by *construction*, by *purchase* or by *contract for their use*. But no one has a right to compel a railroad company to select among these modes or to *contract with all comers*. How cars shall be provided is entirely *matter of private contract*."

In the case at bar the Pullman car is taken into the carrying of a passenger train and thus becomes the car of the carrier. Thereupon, the *R. R. v. Pullman Car Co.* [illegible] and it performs a distinct passenger transportation service in carrying passengers which as shown above the line using it must otherwise have rendered in one of its own cars pursuant to the passenger tariffs for transportation, and as we have seen, this [illegible] means a number of points.

A person complaining the unjust discrimination of an Pullman car charges [illegible] a rate [illegible] more charges that would not charge the defendant as it would be [illegible] a necessary incident to the [illegible] of the car which [illegible] is engaged that generally there is no such thing as the movement of [illegible] car empty, and the practice is

a passenger train, when occupied by passengers, is a similar *freight* shipment.

It is in fact strictly a passenger movement and the freight tariffs for transporting property do not apply.

The truth is that, where the statute permits certain traffic to be treated exceptionally, the Commission by several of its Conference Rulings has held that it is not necessary for the carriers to have, file or publish tariffs in respect to it.

Reference is made to the following Conference Rulings:

> "33. Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without *filing or posting the schedule of such rates with the commission.*"
>
> "208 (e). Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibition at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This special provision and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 *it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations,*" etc.

"218. The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States Government, and *that the rates or fares so made need not be posted or filed with the Commission.* (See rulings 33 and 208e.)"

The Commission has announced the same principle in its decisions. In *United States v. Union Pacific R. R. Co.*, 28 I. C. C. 524, the Commission says, referring to section 22 of the Act:

"In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. The carriers may, and frequently do, avail of this right and *without tariff authorization,* but this Commission is not empowered to require carriers to grant to the United States free transportation or other rates or concessions than those afforded the general public."

Appellees' contention at page 17, that we are seeking to make "the application of the prohibitions in Section 6 of the Act against transporting property without publication of tariff charges" to depend "upon ownership of the property transported, or upon the individual for whom the service is performed," is wholly without justification. We are making no such contention, but on the contrary insist that both these movements are *passen-*

*ger movements* and are not affected by the statute requiring the filing of tariffs for the *shipment of property*. In our view, if in order to perform a transportation service, which a carrier has lawfully contracted to perform free, it is able to secure a car not owned by another carrier, but privately owned, it would be entirely lawful to haul such car free. It would make the car its own for the purposes of performing its own contract for transportation. If all the occupants are passholders, the carrying line may lawfully, if it chooses, transport them in the car which they present, regardless of who may own it or what individuals holding passes compose the party. It is a misconception of our attitude to think that we contend for the proposition that ownership determines whether a charge for a car is to be imposed. On the contrary, we contend that a car, if used as a facility of transportation by a carrier in order to perform a lawful transportation service, may be hauled free, however owned.

In their brief appellees close their eyes to the undisputed fact that the office car is an actual facility of transportation in which passengers are carried who otherwise would occupy *pro tanto* the facilities of the carrying line. They insist that for an office car to become a transportation facility the carrying line must pay a rental for, and must be free to put its own passengers in, such car. In other words, they contend that the contract or arrangement must be of a certain, definite nature; whereas the decisions of both the Commission and the courts hold without a break in the line that

when one railroad procures a passenger car of another and places it in its passenger train, and puts passengers in it, the carrying line thereby makes the car "its own for the purpose of carriage." The decisions all hold that "how cars shall be provided is entirely a matter of private contract," *Worcester Excursion Car Co. v. Penn R. R. Co.*, 3 I. C. C. 584. As declared by the Commission in the same case:

> "Whatever discretion of *preference* a carrier may exercise in the *choice of passenger cars* in its business is *outside of the statute and only an exercise of legitimate authority.*"

As to appellees' contention that the passenger cars used by carriers shall have been acquired only in the way counsel regard as proper, we remind the court that the Commission in the last cited case also said:

> "Every company judges for itself what style of car it desires for its passengers, and *its reasons are unimportant* so long as its patrons are properly served, *nor is it material how the cars are procured.*"

Appellees cite no authority tending to support their contention. They refer to several cases but none is at all in point. Only two are really relied upon. One is *New York & New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361. Appellees' statement of this case at page 31 of their brief shows that the question was whether the Chesapeake & Ohio Railroad Company could transport coal which had been sold to the New York & New Haven at less than the published

freight rates. Being an *article of freight*, the court properly decided that coal could not be shipped to any one at other than tariff rates. The next case was *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 225 U. S. 326. There, also, was involved a shipment of coal, an *article of freight*, and the question was whether the carrying line could transport it for another railroad for less than the tariff charge exacted of other shippers because the coal was to be used for railroad fuel purposes. This, too, was obviously an ordinary freight service, and the court held that fuel coal must be supplied for all shippers alike.

The other cases referred to by appellees merely emphasize what we freely admit—that freight and passenger tariffs must be filed and obeyed. The summary of appellees' conclusions from these cases is thus stated at page 33 of their brief:

> "The decisions in the *New Haven case* and in the *B. & O. case* show that railroads can not be regarded as favored *shippers—exempted from the prohibitions of section 6.*"

As stated, we fully concur in this conclusion, but insist that the transaction herein involved is not a *shipment of freight* regulated by Section 6. Clearly the railroad company is not a "shipper" of its office car when another railroad company adopts it as its own passenger facility and attempts the task of performing what the Commission in the Worcester case, *supra*, describes as "so extraordinary, and to some extent, hazardous service as that of transporting passengers over its lines."

Appellees' argument, and practically their whole argument, is thus stated, beginning at the bottom of page 33:

> "The exception permitting interchange of passes for free transportation of certain persons can not be construed to permit also of free transportation of a whole private car for the passholder; that is, it can not be construed to exempt the transportation of the car from the requirements of Section 6 as to publication and observance of tariff charges on the ground that it is to be transported for an individual entitled to a personal pass."

Again we assert that appellants make no such claim. The only requirements of "Section 6 as to publication and observance of tariff charges" as to property are those relating to shipments of *property as freight,* which we have heretofore undertaken to show is not involved in the office car practice under discussion.

Nor do appellants claim that a pass entitles the holder to the "free transportation of a whole private car" or any other property. Very few holders of passes are transported in private cars, even for their own company, and none can demand it. In each instance it is a matter of individual selection of means by the carrying line, the fact that the proposed occupants hold passes being a mere incident, although an important one in carrying out the arrangement. *The efficacy of the pass lies solely in the fact that its holder is put by the statute into a special class wholly different from the general public.* The result is that he may lawfully

be transported free while all others must pay. This is a discrimination, of course, but a lawful one because the statute expressly makes it so. What is the result? The carrying line is not bound, in its treatment of the pass-holders, by the tariff rules that apply to other passengers who must be charged for their transportation and required to pay the same fares and receive the same accommodations. Those, however, of the excepted class may be transported without charge, and, as the Commission practically admits, as to every vehicle except a foreign owned office car, in any vehicle the carrying line sees fit to furnish them—a coach, a Pullman seat, a Pullman drawing-room, or any of the carrying line's own private cars.

It is proper to state here that as a matter of convenience in designating at whose instance an office car would be handled there was a practice (*approved by the Commission and expressly prescribed by its own Pass Regulations*) of issuing what was called a "car pass," which authorized the handling of a car. The form thus prescribed by the Commission is as follows:

> "Pass John Smith, *car*, and five officers and employees. Account President, officers, and employees of X.Y.Z.Ry." (R. 60.)

This action of the Commission did not purport to rest on any express authorization contained in the statute, but was its authentic interpretation of the various statutes to the effect that where one had the right to free transportation there was no law which forbade the carrying line giving him

any sort of accommodation which it desired to give. This particular feature will be considered further *infra* (p. 34).

The prohibition as to discrimination having been removed, there remains the single question as to whether the carrying line, instead of putting a group of these excepted persons into one of its own private cars, can transport them in an office car owned by another railroad, provided the latter is willing to furnish it and the carrying line to accept it. This, of course, follows if it is lawful for the carrying line to acquire from another railroad a car for this purpose.

We submit that this acquisition and use of the owning line's car by the carrying line as a part of the latter's equipment for the time being is as proper and lawful as if a fixed rental, large or small, or any other consideration, had induced the arrangement. We have shown (our brief, p. 17) that Congress has given the Commission jurisdiction over *freight cars* but has withheld it over passenger cars. Since then, there is no denial by appellees that the Commission has no control over passenger cars, and that a carrier can use its own discretion in procuring them by private contract, there is obviously no lawful objection to this practice provided it is not, as we think has been conclusively shown, the shipment of property. Furthermore, where is there, morally or ethically, any injustice or injury done by this voluntary arrangement which is satisfactory to the two principals concerned? Obviously the arrangement is a mutually beneficial one or it would not have been

maintained so consistently and constantly from the beginning of railroads, nearly one hundred years ago, to the present time, and there has never been any objection from any source, so far as we have been able to learn, until this proceeding by the Commission upon its own motion.

We call attention to the appellees' argument at page 30 of their brief, by which they try to show that our course of reasoning would permit the carrying line to transport free the car of a [illegible] passenger on the theory that the carrying line could thereby make the car its own facility of transportation. They say:

> "And yet, if such use as is made by a foreign road of the private car of another carrier, in accepting it for transportation along with an official entitled to a personal pass, makes the car its facility of transportation, equally it would seem that, if a 'privately owned car' were accepted for transportation along with the holder of a single ticket, it would no longer be 'property' subject to transportation charges because it had become the carrier's facility of transportation."

The fallacy of this argument is patent, for the carrying line could not accept from a passenger holding a ticket his car under a contract to give him the exclusive use of it, for such a contract would clearly amount to a contract to make an unlawful discrimination between that ticket holder and other ticket holders. The car if accepted and used for transportation purposes would still not be "property" shipped, but it

## II

## ALLEGED DISCRIMINATION BECAUSE OF THE PRIVATELY OWNED CAR TARIFF OF TWENTY FIVE FARES.

As shown by the analysis of appellees' argument, given *supra* (p. 2), there are two claims of discrimination. They are entirely distinct from each other and should not be confused. The first, and the only one considered or passed upon by the Commission, relates to the privately owned car tariff of 25 fares. The second, which was initiated by the lower court, grows out of the fact that this practice affords to a pass-holder better accommodations than those furnished to a ticket-holder.

this second point in reality not being in the case, for the reason that the Commission made no finding on the subject. (See our Brief, p. 82, *et seq.*) We here consider these in their order.

The Commission in the proceeding herein reviewed held that the office car practice was a discrimination against those who are transported in a privately owned car since the latter are required to pay 2½ fares for such movement in accordance with the regularly adopted and published tariff. This question is discussed at length in our original brief (pp. 64-81) where we think it was demonstrated that no unlawful discrimination arose out of the handling free of an office car occupied by persons entitled to and holding free transportation.

Whether a given transaction is an unlawful discrimination or preference depends upon the *statute*, for such a discrimination is *malum prohibitum* and not *malum in se*. The only two statutes involved are section 2 and paragraph one of section 3 of the Interstate Commerce Act, both of which are set out in appellees' brief at pages 5 and 6. Section 2 condemns inequality of treatment in the transportation of both persons and property and in the transmission of intelligence only where there is involved "the transportation or transmission of a kind of traffic or message under *substantially similar circumstances and conditions.*" In only such a case does the statute declare that "such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." This obviously

does not apply to the case we are discussing because the transportation of a privately owned car for 25 fares is wholly dissimilar from the transportation in an office car of a group of passengers who hold free transportation. In the former case there may be as many as 25 passengers in the privately owned car, and the 25 fares required to be paid by the tariff obviously would be paid for the transportation of those 25 persons in exclusive occupation of a car. In such a case obviously *nothing would be paid for the car.* The conditions and circumstances of this transaction are altogether unlike those of the transportation of an office car containing persons entitled to and holding free transportation, for *nothing need be paid for the transportation of those persons.* It would be difficult to imagine two situations more unlike, since in one car transportation charges would have to be paid for *all the occupants,* while in the other all the occupants were traveling *free.* Obviously the two cases are not comparable, and therefore a comparison between them does not come within the application of the statute. Furthermore, the inherent unreasonableness of trying to put them in the same class at once appears, for if this were done the result would be that the occupants, who may be 25 in number, of the privately owned car will pay simply the ordinary transportation rates which anybody else would pay, and nothing for the car; *whereas the occupants of the office car, who are entitled to free transportation, would be paying 25 fares for the movement of the mere car itself.*

As to paragraph (1) of Section 3 of the Act, it

is obvious that so far as it relates to transportation movements they were *revenue movements* subject to the same *tariff provisions.* The differences we have noted above in describing the two movements in question apply here and show conclusively that the movement of a railroad office car and that of an ordinary private car, not being the same class, do not involve discrimination. In the one case the contract is to carry a person in accordance with the carrier's tariff, viz., 25 fares, if the occupants are to enjoy the exclusive use of their own private car, regardless of the number up to 25—the larger rate per capita where there are less than 25 being abundantly justified by the exclusive privileges granted. In the other case the contract was to carry persons entitled to *free transportation* in some facility which the carrying line must provide, but no particular facility may be demanded. The important point is that those passengers are to be carried free, and whether the carrying line should select one of its own office cars or an office car of the company employing those persons, or owned by some other person, is not a circumstance of moment. The fundamental difference is that one group is carried free of charge and the other group must pay for their transportation.

It is claimed, however, by appellees that the Commission having found that this is a discrimination, that finding cannot be reviewed by the courts. This position is not sound. As shown in our original brief (p. 65 *et seq.*), it is well established that the courts will review and reverse the Commission's finding if it is *not supported by any*

*evidence.* We admit that if this *lawful discrimination* were used for an *unlawful purpose* the Commission could find it to be unlawful discrimination, but there is not a scintilla of evidence in the record, and no such evidence is claimed by appellees, tending to show that this lawful discrimination is for an unlawful purpose or has an unlawful result. The facts are set out in the Commission's report, and these are simply that pass-holders are transported in an office car without payment of any compensation, whereas the occupants of a privately owned car pay 25 fares. This presents, therefore, merely the naked question of law as to whether these uncontroverted facts constitute an unlawful discrimination forbidden by the Interstate Commerce Act.

This Court said, in *Florida v. United States and I. C. C.,* decided January 5, 1931, in dealing with the question of discrimination as to rates:

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce the question is one of the relation of rates to each other."

thus indicating that there must be a rate for each of the transactions, not a rate for one and a free pass for another.

It might have added that unjust discrimination, as to rates, consists in giving different rates to those entitled to the same rates or rates bearing a proper relation to each other; and that, as to practices, unjust discrimination consists in making differences between those entitled to the same treat-

ment. If the law does not entitle two persons to the same treatment, it makes no difference how great the difference in treatment is. This is but a corollary from the principle that, in order for there to be unjust discrimination between two persons, they must belong to the same class. When the law permits differences in treatment between them they do not belong to the same class, the law having assigned them to different classes, and the law establishes no standard of what the differences in treatment between these two classes may be.

The exigencies of the appellees' case apparently coerce them to attach legal importance to the fact that the "practice" of the carriers is to permit exclusive occupancy of the foreign owned car to the pass passengers, and the argument is apparently made that the alleged fact as to "practice" constitutes a conversion of the movement from a facility of transportation to the shipment of property and that the alleged practice constitutes an unjust discrimination against the person paying the twenty-five-fare passenger charge.

As to the first of these contentions, namely, that the alleged exclusive occupancy by a pass-holder of a car converts the movement from a transportation facility to a shipment of property, it must be noted that the practice, whatever it is, cannot change the inherent character of the service. The movement of the car in order to carry the passenger is inherently a transportation service, and the movement cannot be changed from a facility for transportation service to a shipment of property.

Moreover, it is not sound in law to contend that the pass passenger has a right to demand exclusive use of the car. It is not obligatory upon the moving carrier to accept the car at all. If it consents to do so, it may, as a matter of law, attach such conditions as it sees fit, even to the extent of saying that it shall not be exclusively occupied by the pass passenger.

Moreover, we submit that there is no legal obligation on the carrier handling the car not to put an occupant or occupants in it if it sees proper. Doubtless it is done many times. If the President of a railroad—of the carrying line or of some other company not the owner of the car—happened to be traveling in the direction in which the car was going, there would, we imagine, be no hesitancy in accommodating him in the foreign owned car. We submit that it would be within the lawful power of the carrier moving the car to do so if it saw fit.

The fact that it may, as a matter of courtesy, not put other passengers in the car, does not in any way affect the inherent character of the service or convert a transportation facility into the shipment of property.

As to the second of the above mentioned contentions, namely, that to permit a pass passenger the exclusive occupancy of the car constitutes unjust discrimination, we submit that this suggestion is fully answered by the considerations hereinbefore presented. The law permits any treatment in favor of passengers who may, under the law, travel free, and they may be treated differently

from other classes of passengers. As above stated, when the law permits difference in treatment between persons, they do not belong to the same class and there is no limit set by the law as to what the difference in treatment between the two classes may be.

## III

## ALLEGED DISCRIMINATION BETWEEN PAY PASSENGERS AND PASS PASSENGERS

This subject we discussed at pages 82 *et seq.*, of our original brief. This was the sole basis of the lower court's decision, its contention being that under the Interstate Commerce Act a carrier *could not lawfully furnish to the holder of free transportation any better accommodations than those afforded to a pay passenger.* The Commission not only made no such finding, but did not even suggest such a question. The effort in appellees' brief to show from the Commission's opinion that it did undertake to pass on this particular kind of discrimination is clearly not justified by anything to be found in that opinion or in the record and is utterly inconsistent with the statement made in the same brief at page 14 as to just what the Commission did find. No pertinent authority was presented either by the lower court or by the learned counsel for the appellees in their brief in support of any such position. The contention is ineffective for any purpose for two reasons.

In the first place, the court *has no right to initiate a finding of discrimination.* That is en-

trusted by the law initially to the Interstate Commerce Commission, and the court's power is limited to determining whether the Commission's finding is or is not lawful. Here the Commission found unlawful discrimination, but only as between the movement free of an office car occupied by pass-holders and the movement of a privately owned car occupied by pay passengers who were required to pay 25 fares. Because, therefore, this new form of discrimination relied upon by the lower court was never considered or passed upon by the Commission, we insist, for the reasons set out in our original brief (p. 83), that the court was wholly without power to consider or pass upon any such alleged discrimination and this aspect of alleged unlawful discrimination is not involved in the case. (Our original brief, pp. 82-84).

In the next place, even if the court could have properly considered this phase of the case (which we deny), its finding was unlawful and wholly unsupported by any evidence. Here, as in the case of the alleged discrimination against the occupants of a privately owned car, the question depends upon the application to the facts of sections 2 and 3 of the Interstate Commerce Act, both of which have been discussed in the preceding section. Here, as in the other instance, it would be difficult to find two classes more unlike in a transportation transaction than a pay passenger and a pass passenger. The boldest and most pronounced discrimination imaginable already exists between the two, but as shown in the former discussion, this discrimination, however extreme, is lawful because

it is expressly permitted by the statute. Starting with that premise, obviously the two classes are in no sense comparable. The meaning of the statute is that all *pay passengers* must, as among themselves, receive equality of treatment, both as to charges and service. They are equally bound by the tariff provisions, and because of those provisions every one in the class can and must receive just what the tariffs provide for—nothing less and nothing more. Free passengers, however, do not come within the tariff provisions at all. They are distinctly excepted therefrom by those provisions of the statute which authorize them to have free transportation. The purpose and effect of these excepting statutes is aptly stated by this court in *Nashville &c. Ry. v. Tennessee*, 262 U. S. 318, 323.

There the court, after drawing the distinction between the use of free or reduced transportation for a lawful purpose and for an unlawful purpose, subsequently states that the object of the statute is to permit "the preferential treatment of certain classes of shippers and travelers." In this connection the court said:

> "Section 22 must in this matter, as in others, be read in connection *with the rest of the act, and be interpreted with due regard to its manifest purpose. Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511. Congress did not intend, by this provision concerning *reduced rates and free transportation,* to create an *instrument,* by which the carrier was authorized, in its discretion, *to subject interstate commerce to undue prejudice,* or by which the State was empowered to compel the carriers so to do. The object of the section

was *to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited.* And in this respect its provisions are illustrative, not exclusive. It *limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act.* By so doing, *it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases.*"

It is in this connection that this court in *Postal Telegraph Co. v. Tonopah & T. W. R. Co.,* 248 U. S., at page 471, said:

> "Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. *The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute.*"

Since there is nothing in the statute that even squints at the necessity of a carrier confining the accommodations furnished a pass passenger to those furnished a coach passenger, it follows that it may furnish any sort of transportation which it is prepared to give. No reason can be shown why it should not have this right. All that a pay passenger can require is that he have just what the tariffs prescribe for him and that nobody in his class has better. He occupies no such relation to

a pass passenger. From time immemorial the carrier has elected to give to the free passenger whatever service it desired to give—to some it gives the right to ride in the coach free, to others the better position of a seat in a parlor car of its own, to others it gives the use of a Pullman drawing-room (for which it will be remembered it is entitled to a part of the fare known as the surcharge), whereas pay passengers in addition to the Pullman charge must pay *two fares.* This practice has never been questioned, but if the novel suggestion upon which the lower court rested its decision (that a free passenger must be limited to the accommodations furnished a coach passenger), this universal custom would have to be abandoned; and yet there is no reason for abandoning it. Why should not the carrier, having different classes of accommodations, have the right to decide what should be the extent of its gratuity to those holding free transportation? It is true that in anticipation of this argument the lower court, in justification of its rule, said that the difference between the service rendered in the coach and that in the drawing-room of a Pullman car is not enough to constitute an undue discrimination, but obviously such position is untenable since the difference is very marked. But the lower court's opinion itself furnished a still stronger argument against its soundness in its glaring inconsistency in holding that a railroad company *upon its own line* could properly and lawfully carry pass passengers not only in the Pullman but in one of *its own private cars* (R. 107). Its consistency is not relieved by the quali-

fying phrase, "when they are engaged in the duties of their employment," for the statute makes no distinction based upon the purpose for which an officer or employee is travelling. In other words, a lawyer paying his fare could ride in a coach, whereas a minister of religion holding free transportation could be carried in the railroad company's private car. A moment's reflection will show that so far as this difference of treatment between the two passengers is concerned it is immaterial whether the preferred passenger is riding in a car owned by the *carrying line* or in *one of its own cars.* To the public the distinction is just as great, and if it be an unlawful discrimination it is just as extreme in the one case as in the other.

In conclusion of this subject of discrimination we wish to state that the appellees are mistaken in certain observations made at pages 45 and 47 of their brief, wherein they seem to state the appellants' view to be that

> "the passengers involved must be of the same class in the narrow sense of being engaged in competitive commercial travel."

We have nowhere assumed or countenanced such a position. Their references to pages 73 and 74 of our brief do not even tend to support such an interpretation of our attitude. On the contrary, in concluding the discussion of the Nashville case at page 74 we said:

> "Stated in another way, the alleged discrimination is not between members of the same class. The public is divided by the Act in two

classes, revenue passengers and pass passengers, and difference in the treatment of these two separate classes in respect to the movement of the cars which they occupy cannot in itself constitute unlawful discrimination."

## IV

## APPELLEES CONTEND THAT "NEITHER THE COMMISSION NOR CONGRESS HAS SANCTIONED THE PRACTICE OF TRANSPORTING FREE THE PRIVATE OR OFFICE CARS OF OTHER CARRIERS"

This has been fully discussed in our original brief. There seems to be little difference between counsel and ourselves as to the fundamental principles of law upon which appellees rely in presenting this phase of their argument. Its force is sought to be avoided by the appellees upon the two-fold claim (1) that the Commission has never "sanctioned the practice of transporting free" these office cars, and (2) that if it had, such sanction would not be of force because the statute is not ambiguous.

The ground upon which appellees assert the first of these propositions is the fact that the Commission has never actually decided a case involving the legality of this practice. That is not necessary.

A late case upon the question is the decision of Chief Justice Taft in the case of *Wisconsin v. Illinois,* 278 U. S. 367, 413 (1929). The question there presented was the proper interpretation of an Act of Congress, section 10 of its Act of March 3, 1899, which prohibited the creation of an ob-

struction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States. This was construed as authorizing the Secretary of War, upon the recommendation of the Chief of Engineers, to determine what obstructions could be placed in navigable waters. It was contended that this construction was wrong and that only Congress could do this. It seems that the construction just mentioned had been acted upon by the Government officials continuously from a short time after the passage of the Act. Accordingly, this practical construction, because used by the War Department for a long time, was accepted by the Supreme Court as the true construction of the statute, the Chief Justice, at page 413, saying:

> "This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. *Nothing is more convincing in interpretation of a doubtful or ambiguous statute. United States v. Minnesota,* 270 U. S. 181, 205; *Swending v. Washington Water Power Co.*, 265 U. S. 322, 331; *Kern River Co. v. United States,* 257 U. S. 147, 154; *United States v. Burlington & Missouri River R. R.*, 98 U. S. 334, 341; *United States v. Hammers,* 221 U. S. 220, 228; *Logan v. Davis,* 233 U. S. 613, 627."

The Secretary of War was not a judicial officer. It does not appear that he had held hearings and had deliberately made a construction of the statute, but the uniform practice of the War Department for nearly thirty years was construed to be a binding interpretation.

No hearing and deliberate decision, as contended for by the appellees, is necessary in order for the Commission to make an interpretation of the statute which they are administering. A sustained and long continued course of administrative interpretation is sufficient.

Counsel for defendants in the court below presented the argument that even if the Commission has for forty years construed the law as permitting the hauling free of a car owned by another company, when used as a transportation facility to carry a passenger lawfully entitled to use, and using, free transportation, it can now change its mind and thus destroy the force and effect of its administrative interpretation of the law over this long period of time.

The Commission cannot do this for two reasons: First, because the real question is what the court will regard as the administrative ruling of the Commission, and that ruling, under the authorities, is the contemporaneous and long continued administrative interpretation of the law—not a sudden and abrupt change, for some reason, of an administrative policy; in other words, while the Commission may change its mind, it cannot change the law, and the law had been established by its contemporaneous and long continued interpretation before it suddenly changed its mind; and, second, because the change now made by the Commission, after forty years of administering the law under a different interpretation, is clearly wrong, as shown by the authorities cited in our original brief.

The Commission is an administrative body, its function being the general supervision and regulation of the transportation activities of railroad companies. It gave tacit recognition of the lawfulness of its practice during all of these years and after it had full knowledge of the nature of the practice, through its consideration of this practice in the *Tap Line case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494, and the *Five Per Cent case*, 31 I. C. C. 351, 410, all of which are fully discussed in our brief at pages 45 *et seq.* But it did more than tacitly recognize it for in its Pass Regulations discussed at pages 49, *et seq.*, of our brief, it not only clearly and definitely recognized the propriety of this practice, but expressly prescribed just how a carrier was to proceed in the matter of hauling without charge the car of another when appropriately occupied.

The other ground of appellees' contention is equally fallacious. They simply insist that the statutes are not ambiguous and hence that this age-old rule of construction does not apply. The statute here under consideration is not a single one but is a combination of the pertinent ones. We believe that we have successfully shown that taking these statutes as a whole, that is, those relating to free transportation, to the filing of tariffs, and to discriminations, the holders of free transportation are so exempted from their operation that they occupy an entirely different position and constitute an entirely different class from the general public. But if we are wrong in this, certainly the appellees are in no position to claim that the

statute is not at least ambiguous in view of the fact that, as shown in our original brief, beginning at p. 45, the Commission itself for a period of forty-two years has construed the statutes to mean the exact contrary of what it now claims is their meaning. While we insist that the statutes are perfectly clear and mean what the Commission construed them to mean over this long period of forty-two years, still if there is any doubt about it, the rule of statutory interpretation which we have invoked, to the effect that the courts will accept the long continued administrative interpretation by the body charged with the administration of the law, clearly applies and is conclusive in favor of the appellants' view. This is strengthened by the subsequent enactment of the statutes by Congress without change.

Respectfully submitted,

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January 10, 1931.

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No. 333

# In the Supreme Court of the United States

OCTOBER TERM, 1930

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY ET AL., APPELLANTS,

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

## BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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JANUARY, 1931.

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

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No. 333

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, et al., appellants

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees

---

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY*

---

## BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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### OPINIONS

The opinion of the specially constituted District Court (R. 99) has not been reported.

The report of the Interstate Commerce Commission (R. 17) is reported in 155 I. C. C. 775.

### QUESTIONS PRESENTED

The Interstate Commerce Commission, in a proceeding instituted on its own motion, entered an

order requiring carriers by railroad to cease and desist from the transportation or movement of private passenger-train cars, including so-called office cars, of other carriers free or at other than published tariff rates. Appellants filed a petition in the District Court to enjoin the Commission's order, asserting that, under a proper construction of the provisions of the Interstate Commerce Act, carriers have the right to transport free the private or office cars of other carriers, when occupied by persons using, and lawfully entitled to use, passes, and to perform accessorial transportation as incidental to such free transportation. The District Court dismissed the petition.

The questions which relate to the validity of the Commission's order, are:

1. Can the provisions of the Interstate Commerce Act giving carriers the right to grant personal passes to the officials and employees of other carriers, and their families, be so construed as to permit a carrier to transport free the private, or office, car of another carrier when the car is occupied by a pass holder, or (if moving "deadhead"[1]), when it is to be, or has been, occupied by a pass holder, despite the requirements of the Act as to publication and observance of tariff charges for trans-

[1] A substantial portion of the total mileage of private cars was shown to be "deadhead" mileage, "that is, the cars were not occupied, except in some instances by an attendant." "The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied." (R. 25 to 26; Appellants' Br. 7.)

portation of property and the prohibitions of the Act against unjust discrimination and undue preference?

2. Can such construction of the provisions permitting carriers to grant personal passes to officials and employees of other carriers be found in any past decision of the Commission and read by implication into the statute, as subsequently reenacted?

## STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are, in the order discussed in the brief, paragraphs (1) and (7) of Section 6, Section 2, paragraph (1) of Section 3, paragraph (7) of Section 1 and paragraph (1) of Section 22, which read as follows:

> Sec. 6. (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules

printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. (C. 3591, 34 Stat. 586; C. 91, 41 Stat. 483; U. S. C. Title 49, Sec. 6(1).)

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier

charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges, or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (C. 3591, 34 Stat. 587; c. 91, 41 Stat. 483; U. S. C. Title 49, sec. 6 (7).)

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be un-

lawful. (C. 104, 24 Stat. 379; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 2.)

Sec. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (C. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 3 (1).)

Sec. 1. (7) No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for

Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families*; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers, subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, per-

sons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (C. 3591, 34 Stat. 584, 585; U. S. C. Title 49, sec. 1(7).)

SEC. 22. (1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or mu-

nicipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, *or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;* and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special

privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with

the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso. * * * (25 Stat. 855; U. S. C. Title 49, sec. 22 (1).)

## STATEMENT

Appellants brought suit in the United States District Court for the Western District of Kentucky, sitting as a specially constituted three-judge court, to set aside and enjoin the following two orders of the Interstate Commerce Commission:

(1) Order entered by the Commission November 4, 1929, in No. 17757, *In the Matter of Use of Private Passenger Train Cars*, 155 I. C. C. 775, which required appellants and other carriers therein named to cease and desist "from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates." (R. 10, 11.)

(2) Order made by the Commission, Division 4, July 30, 1929, amending in particulars, which will be hereinafter described, the Commission's Regulations to Govern the Form and Recording of Passes.

The proceeding, in which the first above-described order was entered, was instituted December 7, 1925, on the Commission's own motion pursuant to authority conferred upon it by Section

13(2) of the Interstate Commerce Act. (C. 309, 36 Stat., 551; U. S. C. Title 49, sec. 13 (2).) A questionnaire was sent to all Class I [2] and II carriers and to switching and terminal carriers, calling for information as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The salient facts are that carriers transport free of charge the private, or office, cars [3] of other carriers when occupied by persons, for whose transportation the law permits a pass to be issued, such as the officials and employees of other carriers and their families; that they perform incidental, or accessorial, transportation free of charge (R. 8, 9), when the cars are not so occupied, as for example, in moving the car "deadhead" [4] to stations where they are to be occupied, in returning them "deadhead" to their home stations after occupancy, or in switching and storing the cars when awaiting occupancy (R. 25, 26, 24, Br. 7); and that the owning roads, or occupying pass holders, retain domin-

[2] Class I: Annual operating revenues above $1,000,000. In 1925 Class I carriers operated "about 91 per cent of the railroad mileage of the United States." (R. 2.)

[3] Hereinafter called private cars, whether being used for recreation or business.

[4] "Not occupied, except in some instances by an attendant." (R. 26.)

ion over such private or office cars, when moving or held on foreign roads, for their own particular use,[1] and the foreign roads are not at liberty to make other use of the cars (R. 35, 36). The further fact should here be mentioned that the carriers publish and exact certain minimum fares and surcharges (usually 25) for the transportation of privately owned, or chartered, cars, which are the same whether a car is occupied by 1 or 25 passengers. (R. 33, 34, 39, 49.)

On July 23, 1928, a proposed report was served upon appellants and all other carriers (R. 2) which reached the conclusion and finding that the practice of transporting free or at other than published tariff rates the private, or office, cars of other carriers was contrary to the provisions of the Interstate Commerce Act, and that it resulted in unjust discrimination and the according of undue preference. Subsequently the carriers named in the Commission's order of November 4, 1929, "appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had." (R. 10.) On June 21, 1929, the Commission issued its report in the proceeding, wherein it adopted the conclusion and findings recommended in the proposed report. The carriers were admonished that they would "be expected to cease and desist from

[1] Ticket passengers sometimes occupy the cars, but only by invitation of the occupying pass holder. (R. 35.)

the violations of the Act herein found" (R. 17 to 43), but no order was entered at that time. The order issued in the proceeding, namely, the above-described order of November 4, 1929, was entered after the carriers, against whom it is directed, had "waived any further or additional hearing before the Commission to that which had been given prior to said order" (R. 124, 10). In preliminary recitals contained in the order the findings made in the Commission's report (R. 39, 40, 42) were condensed to read as follows:

> 1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act to another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act.
>
> 2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and rates for the movement of privately owned or chartered cars, and
>
> 3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial (R. 10, 11).

The other order here involved, namely, that made July 30, 1929, "by the Commission, Division 4" (R. 44), amending the Commission's Regulations to Govern the Forms and Recording of Passes is not an order entered in the *Private Car Case*. Its making, however, was induced by contentions advanced in that proceeding to the effect that the form of pass prescribed by the then regulations, which included the word "car," covered foreign-line cars as well as home-line cars. (R. 26.) The Commission pointed out reasons why such interpretation could not properly be attributed to its form of pass, but, in order to remove the matter beyond dispute, it added by its amendment the express statement that "a car pass may be issued only for cars owned by the issuing carrier or held by it under lease" and that "it may not be issued for other cars."

December 14, 1929, appellants filed their petition to enjoin the two orders of the Commission above described. (R. 1.) The case was argued and submitted as on final hearing on the application for permanent injunction. May 28, 1930, the court rendered its opinion upon final hearing. (R. 99.) June 18, 1930, final decree was entered, dismissing the petition. (R. 107.)

## SUMMARY OF ARGUMENT

I. Appellants' admitted practice of transporting free and without publication of tariff charges the private cars of other carriers, when occupied by

officials of the owning carriers or other persons for whose transportation the law permits a pass to be issued, and of performing free incidental "deadhead" transportation, in returning such cars to their home stations, or in moving them to stations where they are to be occupied, violates the prohibitions in section 6 of the Interstate Commerce Act against transporting property unless charges for its transportation had been published and filed and against the giving to any person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

1. Appellants' contention that the private car of one carrier on the line of another is not "property" subject to transportation charges, when occupied by a person traveling on a pass because, under such circumstances, it becomes the foreign line's own facility of transportation is contrary to the law and the facts. While freight cars and passenger cars under revenue load are customarily not subject to transportation charges on foreign lines the reasons for that are that they are moving in through service under joint or through rates and that a rental is paid by the foreign line for their use. As distinguished from such movements, rolling equipment of all kinds is subject to transportation charges on foreign lines when transported for the sole benefit of the owners, and this is given recognition in the tariffs of appellants and all carriers. Under the

"private-car practice" of the carriers, the owner or pass holder retains dominion of the car for his own exclusive purposes and a foreign line can not make other use of the car, whether transporting it occupied by a pass holder, whether transporting it "deadhead" or whether holding it on its line awaiting occupancy by a pass holder; and, of course, no rental is paid for a private car which a foreign line is transporting free of charge for the benefit of another.

2. That private cars of individuals or corporations are recognized by appellants and other carriers as "property" subject to transportation charges is shown by the fact that, for "privately owned or chartered cars," the tariffs name a fixed number of fares and surcharges (usually 25) regardless of whether 1 or 25 persons are to occupy. The only material difference between these cars and the private cars of carriers occupied by a pass holder, is the matter of who owns or is using them. The application of the prohibitions in section 6 of the Act against transporting property without publication of tariff charges and against extending to any person any privileges or facilities except as specified in published tariffs can not lawfully be made to depend upon ownership of the property transported, or upon the individual for whom the service is performed, since the fundamental purpose of those provisions and of the Act as a whole is to do away with discriminations based on any such distinctions.

3. The evil of discrimination was the principal thing aimed at by the Act to Regulate Commerce, and the prohibitions in section 6 against transportation of property unless tariff charges therefor had been filed and published was enacted by Congress as the most effective method of putting a stop to that evil. Appellants' contention that the private car of one carrier on the line of another is the latter's own facility and not property subject to transportation charges when it is occupied by a pass holder would make of the provision permitting issuance of passes to specified persons an instrument for the evasion of the fundamental purpose of the Act.

II. Despite the fact that the exceptions in section 1 (7) and section 22 of the Act permit of free transportation of specified individuals, transportation services rendered them free of charge, which is not covered by the manifest purpose of the exceptions, may in law, and does in fact, subject paying passengers to unjust discrimination and undue prejudice in violation of sections 2 and 3 of the Act.

III. All of appellants' contentions, despite the differences in underlying reasoning, present the single question as to whether the exceptions in the Act, which permit of free transportation of specified individuals, permit also of free transportation of private cars. Such construction of the exception would disregard the elementary rule that exceptions from a policy embodied in a statute must

be narrowly construed; it would in fact add to the Act an entirely new exception.

IV. The principle of statutory construction whereunder the interpretation given to ambiguous language in a statute by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently re-enacted without change in the particulars so construed, which appellants have invoked in defense of their practice, is inapplicable because the language of the statute is plain and unambiguous and because the Commission has not given to the statute the interpretation contended for by appellants.

## ARGUMENT

### I. APPELLANTS' PRACTICE OF TRANSPORTING FREE THE PRIVATE CARS OF OTHER CARRIERS IS NOT EXCEPTED FROM THE REQUIREMENTS OF THE INTERSTATE COMMERCE ACT AS TO PUBLICATION AND OBSERVANCE OF TARIFF CHARGES FOR TRANSPORTATION OF PROPERTY OR FROM THE PROHIBITIONS OF THE ACT AGAINST UNJUST DISCRIMINATION AND UNDUE PREFERENCE BY VIRTUE OF THE OCCUPANCY OF THE CARS BY PERSONS FOR WHOSE TRANSPORTATION THE LAW PERMITS A PERSONAL PASS TO BE ISSUED

Assembling in summarized form the provisions of the Interstate Commerce Act here involved: Section 6 requires the carriers to file and publish all rates or charges for transportation between points on their own lines and between points on their own lines and points on the lines of other carriers. It forbids a carrier from transporting

property or passengers unless the rates or charges upon which same are transported have been filed and published; from charging any different compensation than that specified in the published tariffs and from extending to any shipper or *person* any privileges or facilities except such as are specified in its tariffs. Section 2 forbids any unjust discrimination in charges for transportation of property or persons under substantially similar circumstances and conditions. Section 3 forbids the giving of any undue preference or advantage to any person or corporation or any particular description of traffic in any respect whatsoever. The only exceptions in any way qualifying the above requirements and prohibitions are: (1) As to property, section 22 contains an exception, which permits transportation free or at reduced rates for the United States, for the States and Municipalities, and for certain charitable purposes; and (2) as to persons, section 22 and paragraph (7) of section 1 contain exceptions to the prohibitions against "free passes" or "free tickets," which permit the carriers to grant passes for certain charitable purposes and for certain other named purposes, with which we are not here concerned, and permit them to grant passes to their own officials, employees and their families, *and to interchange passes for the officers, agents, and employees of common carriers, and their families.*

Appellants admit that, prior to the Commission's decision herein involved, it was their practice to

transport the private car of another carrier free of charge and without publication of tariff charge for its transportation "when occupied by a person using, and lawfully entitled to use, free transportation," namely, an official of the owning road, or other person for whose transportation the law permits a pass to be issued. (Br. 7.) Moreover, if the official of the owning carrier, or other pass holder, made a stop at a pleasure resort or at a business center, it is clear that the car had to be either switched and held on the foreign line (as the office of the owning carrier's official, when on business) or returned to its home line. If it was returned to its home line, it had to be transported back to the pass holder for his return from his trip. Appellants' defense of this latter practice is, apparently, that such transportation was accessorial or incidental to transportation that had been, or was to be, performed with an official of the owning carrier, or other person traveling on pass, in occupancy of the car. (Br. 7; R. 8.) In justification of the practice as a whole, they state that a railroad official must frequently travel on business to points on other carriers' lines and must have with him "considerable records, files, correspondence, papers, profiles, blue prints, and necessary clerical forces" * * *. "He takes them in what is known as a private, office, or business car and this car is in reality the same as his office." (Br. 11.) As to the free transportation of private cars for

officials of other roads, or members of their families, traveling for recreation, appellants rely upon the occupancy of the car, present, past, or prospective, by an individual for whose transportation the law permits a "free pass" or "free ticket" to be issued.

Obviously, application of the Act's prohibitions against transporting property without tariff charges on file, against extending to any person any privileges or facilities except as specified in published tariffs, against unjust discriminations and against the giving of any undue preference "in any respect whatsoever," can not be lawfully made to depend upon ownership of the property transported, or upon the individual for whom the service is performed, since the fundamental purpose of those provisions and of the Act as a whole was to do away with discriminations based on any such distinctions. *Houston, etc., Ry. v. United States*, 234 U. S. 342, 356. The Act makes no exceptions permitting carriers to favor other carriers in the transportation of property (*Int. Comm. Com. v. B. & O. R. Co.*, 225 U. S. 326) and the exception permitting interchange of passes for officials and employees of common carriers clearly can not be construed to allow of the free transportation of a whole private car as well as the person of a passholder. Such construction would be contrary to the manifest purpose of the exception. *Nashville, Chattanooga & St. L. Ry. v. Tennessee*, 262 U. S. 318, 323. It would disregard the elementary rule

that exceptions from a policy embodied in a statute must be strictly construed. *Spokane & Inland R. Co.* v. *United States,* 241 U. S. 344, 350. It would, in fact, add to the Act an entirely new exception. *L. & N. R. Co.* v. *Mottley,* 219 U. S. 467, 479.

**1. Rolling equipment of every kind is recognized by appellants and all carriers as "property" subject to transportation charges under section 6 when transported as the property of another[6] and for his sole benefit; the private car of another carrier can not be placed in a different category by virtue of its occupancy by an individual using, and entitled to use, a personal pass**

Giving separate consideration to section 6 of the Act, paragraph (1) thereof requires the carriers to file and keep open to public inspection all rates and charges between points on their own lines and between points on their lines and the lines of other carriers. Because of its importance, paragraph (7) of said section is again set forth in full, and reads as follows:

> No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or

[6] Where the owner or charterer retains dominion over the car for his exclusive purpose.

> demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

In short, a carrier is forbidden to transport property unless the charge for its transportation has been filed and published. It can not charge or receive a greater or less or different compensation than that specified in its tariff rates, directly or by any indirect means. It is forbidden to extend to any shipper or *person* any privilege or facility in the transportation of passengers or property except such as are specified in its tariffs.

The violations of Section 6, of which appellants are guilty, are that they transported property without tariff charges on file for its transportation and extended to persons privileges or facilities not named in their tariffs. Those violations are of the provisions of the Act itself, which surely must be as strictly observed as tariffs filed in furtherance of said provisions. If the transportation of private cars here involved were for noncarrier corpora-

tions, or for persons not traveling on passes, it may be assumed that appellants would not contend that, by neglecting to publish charges therefor, they would become privileged to perform the transportation free of charge.

In *Legality of Express Frauks*, 50 I. C. C. 599, it was said:

> The free carriage either of persons or of property is contrary to the general principles to be found in the act to regulate commerce, as amended. (See sections 2, 3, and 6. * * * Any free carriage of passengers that is now lawful is authorized in the form of exceptions to the general principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act.

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, this court said at pages 478 and 479:

> Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions *of existing contracts*, it forbade by broad, explicit words *any* carrier to charge, demand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of pas-

> category of property that was specified in its published schedules of rates. The court cannot add an exception based on equitable grounds when Congress forebore to make such an exception.

As heretofore shown, the Act's only exceptions permitting of free transportation of property are confined to transportation of property for certain governmental and charitable purposes. Appellants do not contend that the transportation of private cars of other carriers falls within any of those exceptions.

Moreover, appellants do not dispute the fact that rolling equipment of every kind is "property," subject to transportation charges under section 6 of the Act when transported as the property of another carrier and for its sole benefit. Their contention is that a private car of one carrier on the line of another is not "property" subject to transportation charges when occupied by a person traveling on a pass because, under such circumstances, so they allege, it has become the facility of transportation of the foreign line. It is their further view, apparently, that when the car is transported "deadhead" by the foreign line, in returning it to its home station or in moving it to a station where it is to be occupied (Br. 7) and when "accessorial" switching and storage service (R. 24, 26) is performed pending actual use of the car by an official of the owning line, for whose transportation the law permits a pass to be issued,

the car still is the foreign line's facility of transportation. Appellants do not dispute the fact that the foreign line does not pay "per diem" or other rental for such car. (R. 36.) Their contention that it is the foreign line's facility of transportation seems rather to rest on the theory that it is made such by the mere fact that it is accepted for transportation along with an individual for whose transportation the law permits a pass to be issued. But the objection to this is that the facts show that dominion over private cars, transported and held on foreign lines, is at all times retained for the particular uses of the owning carrier, or of its official or other person traveling on a pass. (R. 31, 35, 36.)

In connection with appellants' contention, the circumstances under which equipment of another carrier is "property" subject to transportation charges and those under which it may be lawfully treated as part of a foreign line's own instrumentalities of transportation should be considered. Of course a carrier can haul its own cars or, for that matter, any other of its own property, such as road materials, fuel, and the like, without tariff charge, as it would serve no useful purpose to require it to transfer money from one pocket to another. And also, equipment which it has rented and is using in revenue service is not subject to transportation charges on its line. For example, freight cars move freely on foreign lines in maintaining through service under joint or through rates.

They are interchanged under rules of the American Railway Association, whereby the carrier in possession pays to the owning carrier a certain amount called a "per diem" for each day the car is on its line. The "per diem" is in effect a rental, and it is paid whether the car is loaded or empty, as the return-empty movement is regarded under the tariff charges as incidental to the loaded movement. The carrier in possession has the right to load a foreign car with revenue freight (R. 32), which circumstance is in sharp contrast with the fact that a foreign line can not make use of a private car of another moving "deadhead" on its line, or held on its line awaiting occupancy. Passenger cars are also to some extent operated over the lines of other carriers in maintaining through service. This is done either under contract, or, in the absence of contract a "per diem," or certain amounts per mile, are paid as rental by the foreign line under rules of the American Railway Association. (R. 33.) In regular revenue service, then, cars of other lines are not subject to tariff charges, for they are rented by the carrier in possession. Privately owned freight cars, such as coal cars and refrigeration cars, are also used by the carriers, but that use is for revenue-producing purposes and the carriers pay the owners an allowance therefor. (R. 33.) As to Pullman cars, the railroads employ the Pullman Company to perform a service for them; the cars are in effect hired and the railroads have the

exclusive right to the use. *Chicago R. Co.* v. *Pullman Co.*, 139 U. S. 79, 89, 95. *Worcester Car Co.* v. *Penn. R. Co.*, 3 I. C. C. 577, 588.

On the other hand, cars transported as the property of another and for his benefit are regarded as "property" subject to transportation charges. The consolidated classification, filed with the tariffs, provides charges per car per mile for transportation of all kinds of railway equipment on their own wheels. They apply on new cars moving from place of manufacture, on cars moving to and from repair shops off home lines, and on any other movements over foreign lines not in regular service. (R. 32, 33.) A car, then, although a vehicle of transportation, still is recognized as property subject to transportation charges when transported by a carrier as the property of another and for his benefit. That private passenger cars of individuals or corporations are similarly recognized as "property" subject to transportation charges is shown by the fact that, for "privately owned" or chartered cars, the tariffs name a fixed number of fares and of surcharges (usually 25) regardless of whether one or twenty-five persons are to occupy, and that they also call for a minimum flat charge.[7] (R. 33, 34, 40.)

[7] This disputes appellants' theory that the word "property" as used in section 6 refers only to consigned freight. A car is property and if it should be consigned, that appears entirely practicable.

The practice in respect of private cars of carriers on foreign lines is lacking in the elements which would constitute them the foreign lines' facilities of transportation. Such cars are not the hired cars of foreign roads over which they move, since the latter, of course, pay no rental for cars which they are transporting without charge and in non-revenue producing service. (R. 36.) Moreover, if appellants' contention that the cars are the foreign roads' equipment is based on the theory that their use is borrowed, the borrowing is of peculiarly restricted character.* Just as private individuals retain the right to the exclusive use of their private cars when transported at tariff charges, the owning carriers of private cars, moving or held on foreign lines, or the occupying officials, retain dominion over the cars for their own particular uses; and the foreign roads are not at liberty to make other use of the cars.

Appellants' theory that such use as is made by a foreign road of a private car in transporting it for the owning road, or for its official or other individual entitled to a personal pass, causes the car to

* Decisions which have held that carriers are left free to furnish their own equipment, whether by purchase, by construction, or by contract (*Chicago, St. L. & N. O. R. R. Co.* v. *Pullman Co.*, 139 U. S. 79; *Scofield* v. *Lake Shore & Mich. So. Ry. Co.*, 2 I. C. C. 118; *Worcester Excursion Car Co.* v. *Penna. R. R. Co.*, 3 I. C. C. 584, 588), clearly are not applicable to show that, where the owner or occupant retains dominion over the car for his own purposes, the car becomes the transporting carrier's own equipment, either leased or borrowed.

undergo a transition from the status of property transported for another to the status of the foreign lines' hired or borrowed facility of transportation would make of the exception permitting free transportation of certain persons an instrument for the evasion of the fundamental provisions of section 6, which require publication and observance of charges for transportation[1] of property and forbid a carrier to extend to any person any privileges or facilities except such as are specified in its published tariffs.

The case of *N. Y. & New Haven R. Co. v. Int. Com. Com.*, 200 U. S. 361, forcefully illustrates that the courts will not permit the transportation service performed by one carrier for another to be so confused with its other dealings with that carrier as to defeat the charges which it is required by statute to exact, even from another carrier. In that case there was involved a contract of the Chesapeake & Ohio with the New Haven, whereunder the former purchased coal in West Virginia and

[1] The word "transportation" is, of course, not used in section 6 in the limited sense of its original Latin derivation. For example, pipe-line companies are included among the carriers, which are required by section 6(1) to publish charges for transportation. Oil is "pushed" or "hauled" through pipe lines by pressure or suction pumps. In fact, "transportation" includes both the movement of the property and incidental service as well. In this connection the variety of office records and equipment carried in the car (Br. 11) should be considered. Many articles so carried free are specifically subject to charges under the carriers' tariffs. (R. 31.)

delivered the same to the New Haven at a price, which it was shown did not cover the cost of purchase and published freight rates. The decision in the case sustained the Commission's contention that the transaction effected a departure from published rates.

In *Int. Com. Com.* v. *B. & O. R. Co.*, 225 U. S. 326, involving transportation by one carrier of fuel coal to another carrier, this court held that a railroad can not be made a favored shipper and given lower rates than other persons.

The first of the above cases involved departures from tariff rates, whereas the instant case is, as above explained, rather one of violation of the basic provisions of the Act. But surely the statute has as much dignity as the tariffs required to be filed in furtherance of its purposes. That is, just as the carriers may not depart from the rates which they are required to exact, so likewise they can not accomplish the same result by excluding, or failing to include, in their tariffs charges for transportation of property, contingent merely upon ownership or upon the person for whom the service is performed. Compare *Int. Com. Comm.* v. *Del. L. & W. R. R.*, 220 U. S. 235, 249. The Act commands all charges for transportation of property to be filed and published and forbids its transportation unless such charges have been filed.

In *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, this court said at page 597:

> The chief purpose of the Act (Act to Regulate Commerce, 24 Stat. 379) was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed.

Compare *Davis* v. *Cornwell*, 264 U. S. 560; *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155.

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, it was said (p. 442) that the amendments made by section 2 of the Hepburn Act of 1906 (c. 3591, 34 Stat. 586) to section 6 of the Act to Regulate Commerce show that Congress had come to believe

> that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment but for all shippers and shipments; not for one time only but for all times.

The decisions in the *New Haven case* and in the *B. & O. case* show that railroads can not be regarded as favored shippers—exempted from the prohibitions of section 6. The exception permit-

ting interchange of passes for free transportation of certain persons can not be construed to permit also of free transportation of a whole private car for the passholder; that is, it can not be construed to exempt the transportation of the car from the requirements of section 6 as to publication and observance of tariff charges on the ground that it is to be transported for an individual entitled to a personal pass. Such construction can not be convincingly urged, either directly or indirectly, by asserting that the car is the foreign line's own facility of transportation by virtue of its occupancy by an individual traveling on a personal pass.

The use made of a private car by a foreign line consists of transporting the car, its varied contents,[10] and occupying pass holders, of transporting the car "deadhead" back to its home station or to stations where it is to be occupied (Br. 7) and of performing other accessorial transportation services above mentioned, *all free of charge and all for the benefit and particular purposes of the owing carrier,*[11] *or its official or other person traveling, or expecting to travel, on a pass.* Appel-

[10] "Records, files, correspondence, papers, profiles, blueprints" (Br. 11), "chinaware, foodstuffs, and furniture." (R. 31.)

[11] The private records and other articles in the car show that it is no more borrowed equipment of the foreign line than is a "privately owned or chartered" car, for the transportation of which the tariffs name charges. (Br. 67.)

lants' theory that such use, made by a foreign line of the car of another, constitutes its own facility of transportation and renders its transportation for the owner or occupying pass holder not subject to tariff charge, if adopted, would tend materially to defeat the purposes of section 6.

The chief purpose of the Act to Regulate Commerce was to do away with the evils of preferences and discriminations (*Kansas City Ry. Co.* v. *Albers Comm. Co., supra; Houston, etc., Ry.* v. *United States* (*The Shreveport Case*), 234 U. S. 342, 356), and the prohibition in section 6 against transporting property until tariff charges therefor had been published and filed was considered by Congress to be the most effective method of putting a stop to those evils. *Southern Ry. Co.* v. *Reid, supra.* Appellants' contention that the exception, permitting issuance of "free passes" or "free tickets" for certain specified persons, permits also of free transportation of private cars is "in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed." *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, 350. Indeed the construction of said exception urged by appellants in effect asks of the court that it add an entirely new exception; which this court has held it could not do "when Congress forebore to make such exception." *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467, 478.

Officials of industrial common carriers make a considerable use of the private-car privilege on foreign lines for noncarrier purposes; that is, for the benefit of the industry which controls the carrier. (R. 22 to 27.) Assume that an official of an industry had not become an official of the carrier principally serving the industry, it is clear that his purchase of a single ticket would not entitle him to free transportation of his private car over the trunk lines on any theory that the car was the facility of transportation of each railroad in turn transporting the same. And yet, if such use as is made by a foreign road of the private car of another carrier, in accepting it for transportation along with an official entitled to a personal pass, makes the car its facility of transportation, equally it would seem that, if a "privately owned car" were accepted for transportation along with the holder of a single ticket, it would no longer be "property" subject to transportation charges because it had become the carrier's facility of transportation. As heretofore said, the tariffs of appellants and other carriers name charges (a minimum of 25 fares and surcharges) for transportation of privately owned or chartered cars, but it may be assumed that appellants will not contend that, by neglecting to make such provision in their tariffs, they would become privileged to transport a privately owned car free, if occupied by a single ticket holder.

**2. The commission's order rests not only upon its decision that the practice of the carriers is in violation of section 6 but also upon administrative findings that it results in unjust discrimination and the giving of undue preferences**

The decision of the Commission was not only that the practice of appellants and other carriers contravened the provisions of section 6 of the Interstate Commerce Act, but also that it resulted in unjust discrimination and undue preference. In this latter connection the Commission made the following finding:

> That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars. (R. 10.)

This finding is based on the provisions of section 2 of the Act (page 5, *supra*) which forbid unjust discriminations in charges and upon the still broader language of section 3 which reads:

> (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or un-

> reasonable preference or disadvantage in any respect whatsoever.

The scope of the above language is certainly sufficiently comprehensive to support the Commission's finding that appellants' admitted practice (Br. 67) of transporting free the cars of other railroads when occupied by an individual entitled to a personal pass while charging a minimum of 25 fares and surcharges for transportation of private cars owned or chartered by other passengers, is unjustly discriminatory and unduly preferential and prejudicial.

In *Houston, etc., Ry.* v. *United States*, 234 U. S. 342, speaking of section 3, the Court said at p. 356:

> This language is certainly sweeping enough to embrace all the discrimination of the sort described which it was within the power of Congress to condemn.
>
> * * * * * *
>
> It is apparent from the legislative history of the Act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory act or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it.
>
> "The provisions of the Bill are based upon the theory that the paramount evil charge-

> able against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations * * *." (Senate Report No. 46, 49th Cong., first sess. p. 215.)

What constitutes unjust discrimination or undue preference is, of course, a question of administrative fact for the exclusive determination of the Commission. *Virginian Ry* v. *U. S.*, 272 U. S. 658, 663; *Procter & Gamble* v. *U. S.*, 225 U. S. 282, 297–298; *O'Keefe* v. *U. S.*, 240 U. S. 294, 302–304; *C. R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 33–34.

> (a) The lower court's decision sustains the findings made by the Commission and does not rest upon a new finding of its own.

In anwer to appellants' argument that, inasmuch as there can be no discrimination or preference under the Act except between persons or articles of the same class preferential treatment of the passholder can not constitute a violation of the Act, the lower court said:

> Pass holders and paying passengers are of the same general class—they are all passengers. It costs no more to transport one than the other. The pass holder is lifted out of the provisions of the Act only to the extent that he does not have to pay the usual and ordinary transportation charges exacted of other passengers. In every other respect

> he is on the same footing as other passengers, and if the facilities afforded him are found by the Commission, upon substantial evidence, to amount to an unjust discrimination or an undue or unreasonable preference, the Commission has the power under the Act to deal with the matter without interference from the courts. (R. 106.)

Appellants refer to this conclusion of the lower court as an initial finding of administrative fact that their practice results in discrimination as between pass holders and pay passengers. (Br. 82, 83.) That is, they assert that the Commission's findings did not cover discrimination as between pass holders and pay passengers and that, therefore, since it is an established principle that the courts can not preliminarily pass upon questions of administrative fact, the lower court erred in giving consideration to possible discrimination of such character.

What was condemned by the Commission's order, by its findings and by its whole report was the practice of appellants as it found it. Their admitted practice was to transport free the private cars of other carriers "when occupied by a person using, and lawfully entitled to use, free transportation" and to perform free accessorial transportation "as an incident to *such* free transportation," namely, "the movement of such car to the point on the moving carrier's line where the free transportation is to begin or, after the free trans-

portation is over, the movement back to the owning line." (Br. 7; R. 8, 9.) As shown by the record, by their said admission and by their contentions here and throughout, this practice of appellants was conducted under color of right assumed to be derived from the proviso or exception permitting them to issue passes for the officials and employees of other carriers and their families. As shown by the lower court's opinion (R. 106), its conclusion that pass holders and paying passengers are of the same general class was occasioned by appellant's contention that "preferential treatment of the pass holder can not constitute a violation of the Act." The Commission sets forth in its report instances of operating officials and directors traveling on passes in private cars both on business of the carrier, and for their own pleasure, instances of members of their families traveling on passes in private cars (R. 19 to 21), instances of widows of deceased officials or directors traveling on passes in private cars, (R. 26, 27) and even instances of such individuals traveling on passes in their own cars (R. 26, 27).

In light of the above it seems improbable that appellants' statement that the difference in treatment of pay passengers and pass holders "was not even discussed, much less passed upon by the Commission," is intended to mean that the Commission's report and findings did not treat of pass holders as those given undue preference by their practice. Moreover, when a railroad employee

travels on railroad business it is passenger travel of his employer in the same sense as is the every-day travel by employees of thousands of business concerns the passenger travel of their employers.

As bearing directly on the contention of appellants the Commission's report read as follows:

> As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by 1 passenger or 25. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenues are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them. In so far as these charges do not apply to the private cars of other carriers, they are unjustly discriminatory and unduly preferential and prejudicial. (R. 39, 40.)

The statement in the above that "apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who *owns or is using them*" is a condensed statement of the discrimination covered by the Commission's

findings and against which its order is directed. The words "who owns or is using them" show clearly that the Commission had in mind both the carrier and the passholder passenger as those to whom the carrier's practice gave undue preference. And the person subjected to undue prejudice by their practice is, of course, the paying passenger in that he can not obtain like service or privilege at usual passenger charges but must pay the "minimum charges" for transportation of a special, privately owned, or chartered passenger car.

Probably appellants are confused as to the basis of the Commission's findings because of the fact that, while a car is property subject to transportation charges when transported for another, it is not an industrial product at the moment under transportation to market in commercial competition. It is property already marketed and in use, and its transportation for the owner or user can be more closely likened to the transportation free for a passenger of excess baggage, or of articles which, under the tariffs can not be checked as baggage, such as bicycles or automobiles. (R. 31.)

The lower court, before stating its conclusion that passholder passengers and paying passengers are of the same general class, had said that it seemed wholly immaterial to it whether a private car be regarded—

> "as an article of commerce when moving over the line of a non-owning carrier, or as

> a transportation facility of the moving carrier. If it is an article of commerce, it is being transported free for the benefit of the passholder; if it is a transportation facility of the moving carrier, it is being furnished free to the pass holder." (R. 105.)

A still closer analogy to the instant case than that of baggage would be presented, if we were to assume that appellants' tariff charges on privately owned or chartered cars, in addition to excluding (or failing to include) carrier-owned private cars, expressly excluded the privately owned or chartered cars, for example, of all lawyers. In such case, could it be said that a lawyer traveling for recreation in a chartered car was not given a preference over paying passengers covered by the tariffs, if the railroads performed the transportation on a single passenger ticket? In the event that he was traveling on business of an employing firm of such kind as necessitated his having with him voluminous records and a stenographer, could it be said that his employer was not given a preference, if the railroads transported the car and the two employees on two passenger tickets?

> (b) Undue preference and prejudice may exist in respect of passenger travel regardless of the particular purposes for which passengers are traveling.

In further attack upon the lower court's conclusion that—

> "Pass holders and paying passengers are of the same general class—they are all pas-

> sengers. It costs no more to transport one than the other,"

appellants contend that, since passholders are by law made free passengers, passholders and paying passengers are not members of the same class, between whom the Commission could find the discrimination to be unjust. This contention will be discussed in the next chapter of this brief. Appellants also contend that, before the Commission can find undue preference and prejudice in passenger travel, the passengers involved must be of the same class in the narrow sense of being engaged in competitive commercial travel. (Br. 73, 74.) Any such construction of sections 2 and 3 of the Act would make their provisions unworkable in respect of passenger travel. Many passenger trains run daily between New York and Washington, and between other cities, carrying passengers traveling for recreation purposes of many kinds, for educational purposes of many kinds, for business purposes of many kinds (sometimes their own but more often an employer's) and for many other purposes. All such passengers are clearly entitled under the Act to equality of service for the same charges and to equality of charges for the same service without inquiry by the Commission into the particular purpose of the travel of each.[12]

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[12] Persons traveling at party rates, commutation rates, or excursion rates are in a different class from ordinary passengers for reasons which justify the differentiation from a transportation standpoint.

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, involving the validity of an order entered by the Commission for the purpose of removing discrimination against interstate commerce caused by the low level of intrastate fares, this court said at page 579:

> We have two questions to decide.
>
> First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?
>
> Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?
>
> We shall consider these in their order.
>
> First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (*Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. * * *[13]

In view of the broad general class of passengers traveling in interstate and intrastate commerce, it is clear that this statement could not have been made if it were true that, before the Commission

[13] The validity of the order as a whole was sustained on the second ground, namely, that the low level of intrastate fares cast a burden on interstate commerce in that they did not yield their fair share of the revenue necessary to maintain an efficient transportation service.

can find unjust discrimination in respect of passenger travel, it must inquire into the varied purposes of travel of the passengers to determine whether, as between each and all of those given a preference and each and all of those subjected to prejudice, there exists competitive commercial grounds upon which to base a finding that the discrimination is unjust and undue.

Another contention of appellants should be mentioned, although it does not appear to be directed against anything which the Commission's orders require to be done. They refer to the Commission's order (Division 4) amending its Regulations to Govern the Form and Recording of Passes, wherein it is stated that a car pass may be issued only for cars owned by the issuing carrier or held by it under lease, and assert that this by necessary implication permits "the continued use of free transportation in a carrier's own office car and the consequent giving to a pass passenger different and better accommodations than to a pay passenger." (Br. 84.) Presumably appellants consider that the amendment to the Commission's prescribed form of pass expressly permits them to haul free in their own private cars not only their own officers and employees [14] but also the officers and employees

[14] It is doubtful whether officers or employees of a carrier traveling on its business, in its car and on its line, can be classified as passengers any more than can conductors or brakemen. As to those instances when they or their families are given free transportation for recreation purposes in the

of other carriers, members of their families and other persons of the excepted classes specified in the Act. Whatever may be the proper implication to be drawn from the amendment, the use by appellants and other carriers of their own equipment to give undue preference to individuals entitled to personal passes would be subject to correction by further order of the Commission. The Commission's order entered in the *Private Car case*, forbidding transportation of the private cars of another carrier free of charge, was intended to reach, and does reach, substantially all unjust discriminations shown to have their source in the then practice of the carriers. It is apparent, moreover, that this argument of appellants "is directed not to what the order requires to be done but to what it does not require." *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483.

**3. The exception permitting issuance of passes for free transportation of specified individuals must be construed "with due regard to its manifest purpose" and, when so construed, it does not permit of free transportation of a private car along with the individual**

Appellants' contention that a private car of one carrier on the line of another is the latter's facility of transportation and not property subject to transportation charges under section 6 of the Act, when

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car of their employer and on its own line, there would seem to be a distinction between their travel and that of an ordinary passenger sufficient to account for the fact that the discrimination was not considered to be undue.

the car is occupied by a passholder, or (if moving "deadhead") when it has been, or is to be, occupied by a passholder, is made in reliance upon the exception to the prohibition against "free passes" or "free tickets," which permits of passes for the officers and employees of common carriers, and their families or upon the exception of like purport in section 22. Their contention that their practice of transporting such cars free is outside the Commission's jurisdiction over unjust discriminations and undue preferences under sections 2 and 3 is also clearly made in reliance upon said exception, since it is based on the assertions that there can be no unjust discrimination except between members of the same class and that passholding passengers and paying passengers can not be said to be of the same class because the former are by law made free passengers.

Despite the differences in the underlying reasoning both contentions present the single question as to whether the exception permitting issuance of passes for free transportation of specified individuals permits of free transportation of private cars as well.

In *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 323, this court said, in speaking of the exception in section 22 permitting of free transportation of property for the United States and local governments:

> "Section 22 must in this matter, as in others, be read in connection with the rest

> of the Act, and be interpreted with due regard for its manifest purpose."

In *American Express Co.* v. *United States*, 212 U. S. 522, the United States had obtained an injunction to restrain the express companies from issuing franks for free transportation of property to their own officers, employees, etc., or to the officers and employees of other express companies or other carriers. Express companies, as well as railroads, are carriers subject to the Act. The United States contended that the only exceptions permitting of the free transportation of property are those contained in section 22 allowing free transportation for the United States, the States or Municipalities, or for charitable purposes. The Express Company relied largely upon the exception to the prohibition against "free passes" or "free tickets," which permits of passes for officials and employees of common carriers. The lower court granted the injunction. In affirming the decree, this Court said:

> We are clearly of the opinion, that, without doing violence to the language used in section 1—including the proviso—its terms can not be held to include the transportation of goods.

Moreover, as repeatedly said, the provisions permitting issuance of passes for specified persons constitute exceptions to the basic purposes of the Interstate Commerce Act "to compel the carrier as a public agent to give equal terms to all," "to cut

up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *U. S.* v. *Union Stock Yards*, 226 U. S. 286; and *Assigned Cars for Bituminous Coal Mines*, 93 I. C. C. 701, 718. Sections 2, 3, and 6 are all directed to those ends and the Elkins Act (32 Stat. 847) further emphasizes the purpose to put an end to all discriminations. The rule is well settled that exceptions from a general policy which a law embodies must be narrowly construed.

In *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, the question was involved as to whether the clause in the Safety Appliance Act excepting from its operation cars used upon street railways rendered that Act inapplicable to cars of an electric interurban which were both in street railway and interstate business. The Court held that the primary provisions of the Act were applicable, stating at page 350:

> We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be *in plain disregard*

> *of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.*

Indeed appellants' construction of the exception permitting free transportation of specified persons to include as well the free transportation of private cars, and the "deadhead" movements and switching and storage incidental to their use can not be properly termed a broad interpretation; rather it adds to the Act an entirely new exception.

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, the underlying facts were that appellant railroad had settled for injuries suffered by the appellee and his wife in a train wreck by agreeing to give them passes during their lives. It honored this agreement for some years, but, following the amendments made to the Act to Regulate Commerce by the Hepburn Act of 1906, it took the position that, to do so longer, would subject it to penalties for violation of the law. The decision in the case sustained appellant's view of the law. At pages 478 to 479 it was said:

> Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions

> *of existing contracts,* it forbade by broad, explicit words *any* carrier to charge, demand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court can not add an exception based on equitable grounds when Congress forbore to make such an exception.

As distinguished from the free transportation of private cars in the instant case, which, like the contract for free transportation in the *Mottley case,* is entirely outside of any exception in the Act, the decision in *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee,* 262 U. S. 318, shows that even as to transportation, which, by virtue of an express exception in the Act may be performed free, the privilege may not be exercised in all cases. The facts involved in this case were that the Commission had made a general increase in interstate rates and thereafter the Tennessee State Commission had made like increases in state rates except upon "carload shipments of stone and gravel when for use in building public highways and consigned to federal, state, county, and municipal authorities." Upon complaint of the carriers the Commission found that such exception from the increase in rates resulted in unjust discrimination and undue prejudice to persons and localities engaged in interstate commerce and, pursuant to its authority under section 13 (4), ordered such rates increased to the level of

interstate rates. The State and its Commission instituted suit before a three-judge court to enjoin the order, relying upon the exception (supra, p. 8) in section 22, which permits transportation of property free or at reduced rates for the United States and for the States and Municipalities. The lower court granted the injunction, holding that by reason of said exception the Commission was "without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight"; that the section "excludes this particular traffic from the rate structure which the Commission is authorized to erect and control, in still other words, there is freedom of discrimination."

Upon appeal this court reversed the decree. The paragraph in the decision, which discusses the effect that may be properly attributed to the exceptions in section 22 of the Act, is of particular interest and reads (p. 323):

> Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511. Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object

> of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. Its limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

In the above it is said that the section "limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act" and that "by so doing it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases." The qualifying words "in certain cases" are noteworthy. Moreover it will have been noted that every sentence in the paragraph contains language qualifying the discretion left with the carriers by section 22. For example, it is stated Congress did not intend to create an instrument giving the carriers discretion to subject interstate commerce to undue prejudice; that the object of the section was to settle that preferential treatment of certain classes of shippers and trav-

ellers *in the matters therein recited* was not *necessarily* prohibited, and that the section "must in this matter, as in others, be read in connection *with the rest of the act,* and *be interpreted with due regard to its manifest purpose.*" This qualifying language taken together with the facts, of predominating importance, that, despite the exception in section 22 permitting transportation free or at reduced rates for a state, there is not freedom of discrimination in respect thereof, shows that appellants' contention that the exception permitting free transportation of specified individuals so removes such transportation from the provisions of the Act that private cars may be transported free along with the individual, is unfounded. In passing, the Court's attention is also called to the fact that in the above case the Commission's authority was sustained even though trenching on the reserved powers of a state, in respect whereof the rule is that Federal legislation shall only be taken to supersede local authority to the extent required by the Federal act in express and plain terms. *Ill. Cent. R. Co.* v. *P. U. Comm.,* 245 U. S. 498, 510; *Savage* v. *Jones,* 225 U. S. 501, 533.

Appellants' contention that, because the Act permits them to grant passes to certain persons, unjust discrimination as between pass-holder passengers and paying passengers can not at law be said to be caused by transporting private cars free for the former, if logically followed out, would permit them to grant special train service for a pass

holder, including expedited service and even priority of movement in times of congested traffic and all manner of other preferences. This is too much to read into a provision which merely permits of the granting of personal passes to the officials and employees of another railroad and is, moreover, an exception to the general policy of the Act to cut up by the roots every form of discrimination and favoritism. *L. & N. R. Co.* v. *Mottley, supra.*

II. NEITHER THE COMMISSION NOR CONGRESS HAS SANCTIONED THE PRACTICE OF TRANSPORTING FREE THE PRIVATE OR OFFICE CARS OF OTHER CARRIERS

The final ground asserted by appellants against the validity of the Commission's order is that the Commission has in the past sanctioned the practice of the carriers in moving free the private cars of another carrier, and that Congress has impliedly ratified and recognized such practice as lawful. In support appellants claim that the practice has always existed as the Commission and Congress have well known.

Having in mind the extensive duties of the Commission, the vast volume of records on file with it, and the varied provisions of the Act, it is clear that it can never be said to have sanctioned any particular interpretation of the statute unless such interpretation was squarely in issue before it for decision.

Appellants point to the Commission's conference rulings, which prescribe a form of pass reading as follows:

> Pass John Smith, President, car, and five officers and employees of the X Y Z Ry. Co.

The Commission has abandoned the practice of making conference rulings. They were not its decisions in a proceeding, wherein it would have had the benefit of a record and the views of opposing counsel. As shown in Exhibit C, attached to the petition (R. 43), they were rescinded *in toto* December 26, 1928.

Appellants also point to the Commission's Regulations to Govern the Form and Recording of Passes which, in the 1917 issue, prescribed a form of pass substantially following that prescribed in its conference rulings. (R. 60.) In prescribing said Regulations to Govern the Form and Recording of Passes, the Commission likewise acted informally and ex parte in that its action was pursuant to section 20,[15] paragraph (5) whereof gives the Commission the following authority:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well

[15] The order of July 30, 1929, which is attacked in the petition as well as the order of November 4, 1929, is not, as alleged in the petition (R. 7), an order within the meaning of section 16 (8) of the Act. Section 20 carries its own penalties, but they are for keeping different records than those prescribed by the Commission or for falsifying records. (34 Stat. 594.)

as of the receipts and expenditures of moneys. * * *

Referring to this contention of appellants the Commission's report reads:

> In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of the home line. The form of pass does not specifically indicate whether it is for home or foreign-line cars or both. It might in fact be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars. (R. 36, 37.)

Prior to the proceeding herein involved the practice of transporting free the private cars of other carriers was called to the Commission's attention in three cases only. The Commission's report remarks upon those cases as follows:

> Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge, and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. *The Tap Line Case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was *The Five Per Cent case*, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials. (R. 37.)

The decision in the *Tap Line Cases* turned upon the Commission's view that the particular roads

were plant facilities rather than industrial common carriers, and in the *Five Per Cent Case* the lawfulness of the practice was not in issue. So that it is true that these cases can not be claimed by the Commission as squarely holding the practice to be unlawful, for the precise conditions were not presented and passed upon. But it is that very thing that makes the rule of statutory construction invoked by petitioners inapplicable to this case.

The principle of statutory construction, whereby the interpretation given to ambiguous language by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently reenacted without change in the particulars so construed, obviously can not be loosely applied. In the first place, there is no room for the application of any such principle where the language is plain and unambiguous. Appellants are not claiming that the words of the Act have not a plain meaning but rather are attempting to read into the language their own interpretation, that the personal pass permitted by law may carry with it a whole private car. Secondly, unless the administrative body has ruled precisely as to the proper interpretation to be given an ambiguous statute, it is obvious that Congress can not be said to have adopted such interpretation by reenactment of the statute. That is, even assuming ambiguity in the statute under consideration, Congress can not be said to have adopted an ambig-

uous interpretation to cure such ambiguity in its legislation. Having in mind the informal manner in which the form of pass was prescribed by the Commission, the character of the statutory authority under which it acted and the uncertainty as to what it did mean, the Commission's action in this particular can not be regarded as its considered and precise interpretation of the statute. In the *Tap Line Cases* the Commission condemned the use of "car passes" and in the *Five Per Cent Case* it referred to revenue which the carriers might have secured by exacting charges for transportation of private cars. All that can be said of those cases is that the Commission failed to interpret the statute and declare the general practice of transporting free the cars of other carriers unlawful.

In *United States* v. *Mo. Pac. R. R. Co.*, 278 U. S. 269, involving paragraph (4) of section 15 of the Act, which restricts the Commission from requiring carriers to join in through routes that exclude their long hauls, the Commission had construed the paragraph as only protecting the long hauls of originating carriers, or carriers after obtaining possession of the traffic. This construction followed the interpretation given to the paragraph by a long line of decisions of the Commission involving somewhat similar situations. In holding that Congress could not be said to have adopted the interpretation contended for this Court said at pages 279–280:

> And appellants assert that the Commission in a long line of decisions has held that the rule declared in paragraph (4) applies only to traffic in possession of the carriers, and they argue that this construction was impliedly sanctioned by the inclusion of the provision without alteration in Transportation Act, 1920. But the rule that reenactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment. *New Haven R. R.* v. *Interstate Commerce Comm'n.*, 200 U. S. 361, 401. The rule has no application in this case because, the decisions by the Commission do not show that it had given paragraph (4) the limited effect claimed by appellants; the order here involved conflicts with that provision; and, if any prior decision of the Commission held that the Act empowered it to establish a through route substantially like the one under consideration, that construction was plainly erroneous and did not attach to or become a part of the provision re-enacted.

In *United States* v. *Erie Railroad*, 236 U. S. 259, the United States had brought suit to enjoin railroads from granting interchange passes to officials and employees of carriers not subject to the Act, namely, certain steamship companies. Counsel for the United States relied upon decisions of the Commission and conference rulings holding that the

right to interchange passes was only with carriers subject to the Act, asserting that Congress, having reenacted the statute, adopted the Commission's construction (262). As against this counsel for the carriers pointed to the fact that the provisions relating to interchange of passes in terms permitted exchange between carriers subject to the Act and other carriers (265). Here again the court showed that decisions of an administrative body must be decisive to be given weight in construing a statute, particularly where the language of the statute permits of a contrary construction. After commenting upon the fact that the rulings of the Commission had never been enforced, the Court gave its attention to the railroads' contention that, if the right of interchange was to be limited to interchanging of passes solely with carriers subject to the Act, qualifying words would have to be interpolated into the Act (265). As to this, it was said at page 270:

> It is not denied that the words "carriers," "common carriers," "railroads" and "railroad companies" are used in the act with and without qualification "subject to the provisions of the act," and the number of times they are so used is compared. It will do no good to set forth the instances. The act was passed to regulate the conduct, and affairs of the carriers of the country, and necessarily they are brought under its provisions and subject to them. It controls their relations, but the carriers subject to the act may have relation with other carriers, and special

> provisions would naturally be made to govern that relation. * * *

Just as in the *Erie Railroad case* it would have been necessary to read words into the provisions relating to interchange of passes in order to sustain the contention that Congress had adopted the construction given those provisions by the Commission, so in the instant case appellants' position is in substance that the proviso allowing personal interchange passes for officials and employees of other railroads as an exception to the basic purpose of the Act to do away with discriminations, should be construed as embracing free transportation and handling of a whole private car along with the passholder.

In *American Express Co.* v. *United States*, 212 U. S. 522, there was involved the question as to whether the provisions of the Act permitting carriers to grant passes to their own officials and employees, and interchange passes to the officials and employees of other carriers embraced permission to grant franks for free transportation of property to such officials and their employees. The court held that the pass provisions of the Act could not be construed to include the transportation of goods, and this despite the fact that it was contended that the custom of issuing franks was of long standing and presumably known to Congress; that there was no record of any protest against it by the Commission, nor any suggestion in any speech in Congress that

it was supposed to be detrimental to the public interest or intended to be prohibited.

In the instant situation it can not be asserted that property rights of any substantial character have been assumed in reliance upon the alleged administrative interpretation, which fact is in sharp contrast with the situation in *Logan* v. *Davis*, 233 U. S. 627, one of the outstanding decisions relating to the weight to be given to an interpretation given to an ambiguous statute by the body charged with its administration. In that case this Court said at page 627:

> • • • Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 595.

Appellants call attention to the fact that the Commission decision in the *Five Per Cent Case* was reported to Congress in its Annual Report. But

there was no issue as to the unlawfulness of the carriers' practice in that case. The most that can be urged by appellants in respect of the decision is that the Commission failed to declare the practice unlawful. If the Commission's oversight to take steps to stop every violation of the Act, which study of the vast volume of tariffs and other records on file with it might disclose, or its failure to take steps to stop every practice, perhaps known to it in a general way but not squarely brought to its attention as a violation of the Act, should be regarded as interpretations sanctioning such violations of law, and the subsequent reenactment of the act by Congress as an adoption of such interpretations, the Interstate Commerce Act would present a mass of provisions as to which the ordinary meaning of words would afford no guide to their proper interpretation and legal meaning.

Furthermore, the Commission's order rests both upon its conclusion that the carriers' practice violates the statutory prohibitions in section 6 and upon its administrative findings that the practice results in unjust discrimination and undue prejudice in violation of sections 2 and 3. Viewed from the administrative standpoint the most that can be urged by virtue of the inclusion of the word "car" in the pass form prescribed is that it was the then judgment of the Commission that the practice did not result in unjust discrimination.

The Commission's failure to prosecute and its alleged past rulings in respect of a form of pass

can not be urged as in any way restricting its present judgment upon administrative questions. If this were not true, once the Commission has found certain practices reasonable and nondiscriminatory, it would thereafter be foreclosed from prescribing any different practices. As said in *Virginian Ry.* v. *U. S.*, 272 U. S. 658, at pp. 665, 666:

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541.

## CONCLUSION

The Decree of the lower court denying the prayer for injunction and dismissing the petition for want of equity should be affirmed.

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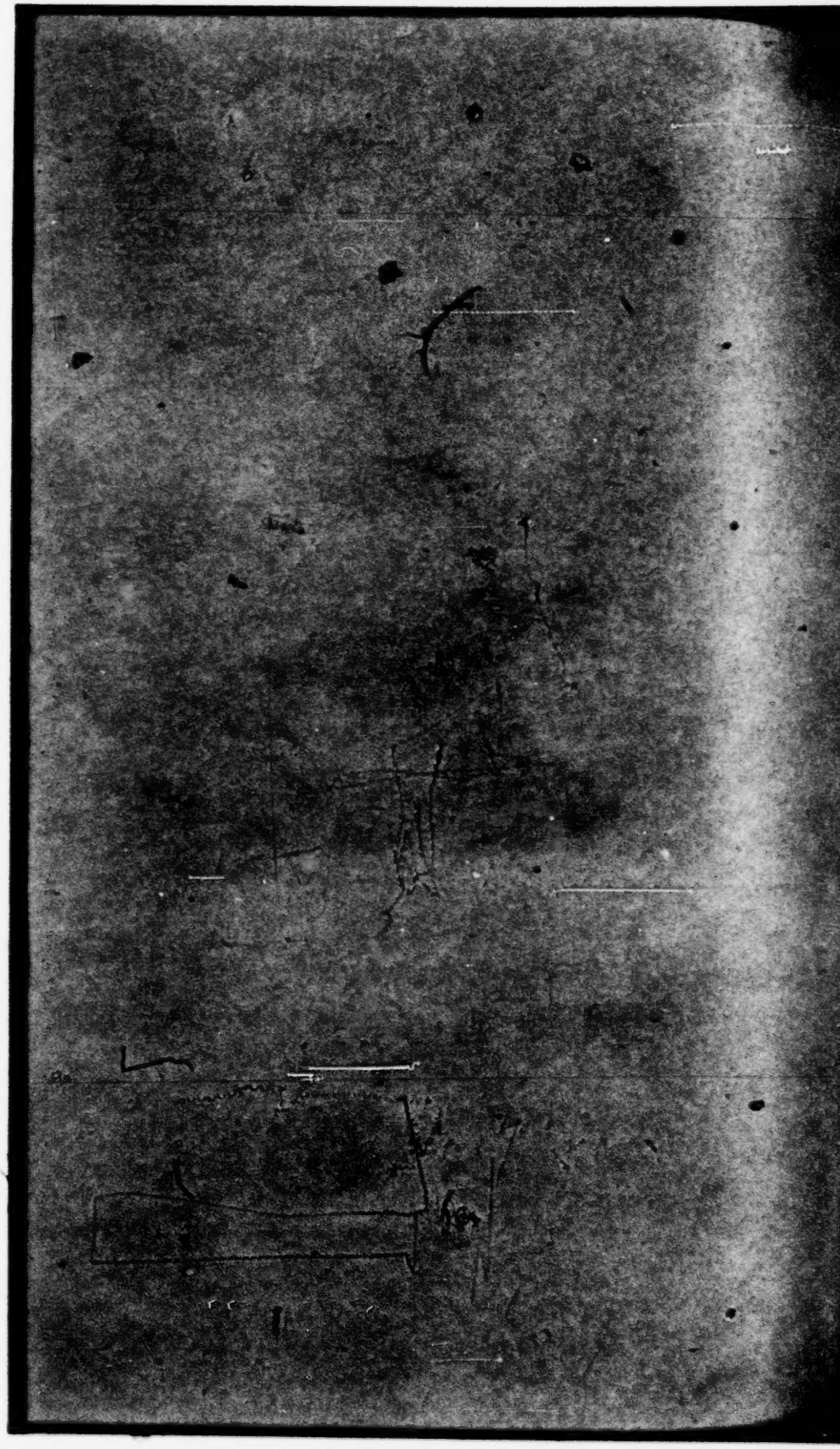

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# SUPREME COURT OF THE UNITED STATES.

No. 333.—October Term, 1930.

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| Louisville & Nashville Railroad Company, Illinois Central Railroad Company, The Baltimore & Ohio Railroad Company, et al., etc., Appellants, vs. United States of America and Interstate Commerce Commission. | Appeal from the District Court of the United States for the Western District of Kentucky. |

[February 25, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This is an appeal from a decree of the District Court, constituted as required by statute, dismissing the petition of the appellants to set aside, in part, two orders of the Interstate Commerce Commission, which were made on November 4, 1929, and July 30, 1929, respectively.

The first mentioned order was made in a proceeding instituted by the Commission in December, 1925, on its own motion, for an investigation concerning the use of private passenger-train cars, including so-called office cars. A questionnaire was sent to all Class I and Class II carriers, and to switching and terminal carriers, calling for information "as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips." Returns were made by 387 carriers covering the calendar years 1923, 1924 and 1925. In July, 1928, a proposed report was served upon appellants and all other carriers. Exceptions were filed by the Association of Railway Executives on behalf of its members, including the appellants; argument was heard and the matter submitted to the Commission. Its report was issued on June 21, 1929, setting forth the Commission's findings and conclusions. 155 I. C. C. 775. After waiver by the carriers of further hearing before the Com-

mission, the order in question was entered requiring the carriers named, including these appellants, "to cease and desist, on or before January 15, 1930, and thereafter to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates".

The other order of the Commission under attack, that is, the order of July 30, 1929, amended the Commission's regulations, governing the form and recording of passes, by the insertion of the following: "A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See In the Matter of Private Passenger Train Cars, 155 I. C. C. 775."

The case was tried in the District Court on the facts detailed in the report of the Commission as to the practices of the carriers, and as to these facts there was no dispute. The Court concluded that the practice condemned by the Commission was a matter within its jurisdiction, and that, the order being supported by substantial evidence, the Court was without power to interfere.

The evidence before the Commission consisted of the returns of the carriers to its questionnaire. These returns contained a vast amount of statistical data, differing in details but practically the same in substance, which were reviewed and tabulated in the Commission's report. The Commission found, in substance[1], that carriers transported free of charge the private, or office, cars[1] of other carriers when occupied by persons for whose transportation it was lawful to issue a pass; that carriers also provided accessorial transportation of such cars free of charge when they were moved "deadhead" to stations where they were to be occupied, or to their home stations after occupancy, and also in switching and storing the cars. The wide extent of the practice and the abuses

[1]The Commission's report and order described the cars in question as private passenger train cars, or private passenger cars, including so-called office cars. The reference is to the private, or office, cars of carriers as distinguished from cars privately owned by persons and corporations other than railroad companies.

attending it were shown.[2] The Commission referred to the proposal of the carriers to undertake the correction of such abuses, and stated that the Commission was concerned primarily with the legality of the free transportation of the private cars of other carriers.

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[2]The Commission's report states (in part): "The returns show that a substantial portion of the total mileage of private passenger-train cars, including so-called office cars, herein referred to collectively as private cars, was on the lines of carriers other than those owning the cars. The private cars thus moved over foreign lines were transported without charge. In other words, a pass was issued covering transportation of the private cars similar to that issued for the transportation of certain classes of persons as provided for in sections 1 and 22 of the act. . . .

"It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants. The facilities thus provided for those traveling in private cars exceed the facilities of the ordinary coach or Pullman car.

"The returns . . . show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach." The report cites many instances of the movement of such cars when in charge of the wives of officials and the widows of deceased officials. . . .

"There is also a substantial use of private cars, both on home and foreign lines, by directors of carriers. . . .

"The movement of private cars to resorts commonly patronized by those seeking recreation or amusement, and located on foreign lines, is very noticeable. . . . There is also an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. The mileage of private cars used by the latter lines is largely on foreign lines, and in numerous instances the home stations of the cars and the movements thereof are so far removed from the vicinity of the owning road that it is difficult to conceive the circumstances under which such movements could have been in the interest of or connected with the operation of the road owning the car. . . .

"The returns show that a substantial portion of the total mileage of private cars, especially on foreign lines, was what is commonly referred to as 'dead-head' mileage, that is, the cars were not occupied, except in some instances by an attendant. The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied. . . . The returns show numerous instances where private cars were dead-headed to and from off-line shops without charge. Also worthy of consideration is the matter of free switching service and free storage for private cars.

With respect to the transportation of privately owned cars, that is, of cars owned by others than carriers, or of cars chartered for the exclusive use of special parties, the Commission found that such cars were transported in passenger trains under tariffs which provided for certain minimum revenues, and that these charges

were intended to cover the service of transporting the cars that is "to compensate for the movement of the car rather than its contents." The Commission concluded that the transportation of the private cars of other carriers free or at less than published rates while making charges for the movement of privately owned or chartered cars was unjustly discriminatory.

Treating the private or other cars of other carriers as property to which the provisions of the Interstate Commerce Act applied and considering that the free transportation of property was lawful only in the exceptions provided in section 22 of the Interstate Commerce Act, the Commission concluded that the transportation of such cars free or at other than published tariff rates was a violation of the Act. The Commission pointed out that its finding "does not extend to the point of saying that it is unlawful for private cars of one carrier to be transported over the lines of other carriers but is confined to the assertion that under existing law the transportation of private cars on foreign lines should be paid for through the assessment of a just and reasonable charge." 150 I. C. C. p. 780.

The conclusions of the Commission were thus summarized in its order of November 6, 1929:

"1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act to another such carrier free or at other

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than tariff rates, or free or at tariff rates where no tariff rates have been published, is unjustly discriminatory and unlawful.

"2. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act to another such carrier free or at other than tariff rates, or free or at tariff rates where no tariff rates have been published, is unlawful where such cars are used in connection with the business of the carrier owning or using them." 150 I. C. C. pp. 787, 788.

"The conclusions must stand or fall alone. As hereinbefore pointed out, the tariffs provide various minimum rates and charges for the movement of specific privately owned or controlled cars which are evidently intended to cover the process of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by passengers or not. Especially is the case of cars moving empty or in charge of porter. It is manifest that the minimum rates and charges are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of the cards or in using them." 150 I. C. C. p. 780.

all others who may desire the transportation of such private cars for their convenience, would require evidence to justify it (unless it can be deemed to lie outside the purview of the statute) and that evidence is lacking. We perceive no ground for disturbing the finding of the Commission as to unjust discrimination, unless it can be said as matter of law that there was none; that is, that the difference in treatment was one which was sanctioned by the Interstate Commerce Act. It is the contention of the appellants that the practice has this sanction.

The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong., 1st sess., p. 215. See *Kansas City Southern Railway Company* v. *Albers Commission Company*, 223 U. S. 573, 597. This Court has said that the language of the Act "is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn".[5] *The Shreveport Case*, 234 U. S. 342, 356. Section 3 provides that "it shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever". The prohibition, of course, does not reach the exceptional cases for which provision is made by sections 1 and 22 of the Act with respect to

[5] "Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful". U. S. C., Tit. 49, sec. 2.

"Sec. 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." U. S. C., Tit. 49, sec. 3.

passes.[6] These provisions relate to the transportation, free or at reduced rates, of the persons and property there described. Neither section provides for the free transportation of private cars. If discrimination, which would otherwise be unjust and condemned by the Act, can be deemed to be saved by the exceptions stated, it must be either because the transportation of a private car is to be regarded as incidental to the free transportation of a passenger who may hold a pass, or because the transportation of a private car occupied by a passenger with a pass is not a service rendered under ~~substantially similar~~ circumstances and conditions ~~as that~~ of the transportation of a private car with passengers paying fares. substantially similar to those

[6] "Sec. 1. . . . (7) No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains

Syllabus.

"Sec. 22. 1. That nothing in this Act shall prevent the exchange, storage or handling, of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the transportation of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; . . . ." U. S. C., Tit. 49, sec. 22 (1).

right of free transportation of the cars in question is made the fundamental consideration and we pass to the examination of that question.

Supporting their contention in this respect, the appellants argue that the movement of the private, or office, car of another carrier is not a shipment of property, that such a car in the movement under consideration is to be regarded as a facility of the carrying line, ranking as its own for the purposes of the service. The Commission dealt with the question when railway equipment generally may be transported without charge. The Commission said that, of course, a carrier may transport its own property without the payment of tariff charges, that, likewise, property which is hired or rented for the performance of its common carrier duties may be transported in the same way as property which it owns. The Commission reviewed the terms on which freight cars and passenger cars move over foreign lines. It found that "so long as a car is being handled for revenue purposes, it is in service and not subject to charges, but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line." The Commission further found that "the criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line." 155 I. C. C., pp. 786, 787. After referring to the tariff charges for the movement of "special, privately owned, or chartered cars for the exclusive use of special parties" when transported in passenger trains,[7] the Commission reached the following conclusion: "It will be seen from the foregoing that tariff charges are provided for the transportation in freight trains of both carrier and privately owned cars of all kinds, when they are handled solely for the benefit of the owner and not for revenue purposes. It would not be seriously urged that such transportation could be rendered free if an attendant or other person having a pass should ride in the car. The tariffs also provide minimum charges for the transportation in passenger trains of special, privately owned, or chartered cars for the exclusive use of special parties. Apparently these minimum charges would not be lessened or affected in any way if a person or persons having passes should ride in the car. All of these charges show that there is nothing in the nature of railway equipment which justifies its transporta-

[7]See Note 3.

tion without charge, except when it is being handled for revenue purposes in the interest of the carrier performing the service. Even then the revenue from a passenger car used exclusively by a special party must be sufficient to warrant its transportation. . . . The transportation of a private car of another carrier is ordinarily for the benefit of the owning line or its officials and not for revenue purposes. While ticket passengers may sometimes occupy such a car, they do so by invitation, and the carrier performing the transportation is not at liberty to make use of the car by putting other passengers in it. The returns to our questionnaire indicate that it is seldom, if ever, that the number of ticket passengers is sufficient to make the hauling of the private car of another carrier profitable to the carrier performing the service. This is further indicated by the additional fact that such passengers apparently do not pay the surcharge, which is assessed on persons riding in Pullman and privately owned or chartered cars. Indeed, the few ticket passengers sometimes riding in the private car of another carrier could probably be accommodated in other equipment that must be hauled anyhow, and the transporting carrier would receive more revenue if they rode in an ordinary Pullman car. Under these circumstances a carrier hauling the private car of another line can not be said to have hired its use, as it would have no interest in doing so and pays no rental therefor. Even if car hire should be provided on private cars, it would obviously be a mere subterfuge which could not change the legality of the practice. Our conclusion is that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its performance without charge, on the same principle as the free handling of revenue-producing equipment". *Id.*, pp. 788, 789. On the findings of the Commission, we perceive no ground for the conclusion that the cars in question are to be treated merely as a facility of the carrying line and not as property transported.

The Commission referred to the argument that the carriers had always hauled the private cars of other lines without charge, and that this practice had been well known to the Commission and had been expressly approved by it. Endeavoring to meet the contention that the Commission in its conference rulings and pass regulations of 1917 had prescribed a form of pass for railway

officials and employees, which included the word "car", and which, as the carriers asserted, applied to foreign-line cars, the Commission said that the form of pass should be given a construction in harmony with the law and that the Commission "never intended to approve the practice of issuing passes for the private cars of other lines". There is, however, no question as to the long-continued practice of transporting the private cars of other lines without charge, and it would seem that the form of pass prescribed by the Commission was available and was used in this practice. The Commission stated that this was the first time that the lawfulness of the practice of issuing passes for foreign-line private cars had been brought in issue before it, but the Commission recognized that the practice prevailed at the time of the passage of the Act to Regulate Commerce and had been continued. It appears that prior to this proceeding, the Commission had not attempted to disturb it.

The Act has been repeatedly amended, and has been reenacted, without any change directed to the correction of this practice. It is strongly urged that in the light of these circumstances the administrative construction should be determinative. The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons. *Logan* v. *Davis*, 233 U. S. 613, 627; *Kern River Company* v. *United States*, 257 U. S. 147, 154; *Swendig* v. *Washington Water Power Company*, 265 U. S. 322, 331; *United States* v. *Minnesota*, 270 U. S. 181, 205; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413. But that principle does not go far enough to control the decision here. There is no ambiguity in the requirement of section 6 (1) of the Act that its provisions as to published tariffs "shall apply to all traffic, transportation, and facilities defined in this Act". Whether the private, or office, cars of other carriers are to be deemed property transported, or a facility of the carrying line, depends upon the circumstances of the carriage as matters of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute. Simularly, there is no ambiguity, so far as the terms of the provision of section 3 (1) are concerned, in its

prohibition of discriminations, when it has been found as a fact that these cars are transported for the benefit of the owning line and do not belong in the category of the facilities of the carrying line, and that transporting them free of charge constitutes an unjust discrimination, as compared with the tariff charges for the transportation of privately owned cars. Nor are the provisions of sections 1 (7) and 22 (1) to be deemed ambiguous by reason of the omission of private, or office, cars owned by carriers from the specification of persons or property that may be carried free. The omission simply takes the cars out of the provisions of the sections. Whatever doubt or uncertainty attached to the application of the provisions of the Act to the transactions under review lay in the appreciation of the facts, and appropriate action thereon, and not in the interpretation of the terms of the law after the facts have been ascertained. Thus, in *American Express Company* v. *United States*, 212 U. S. 522, it was argued by the appellants that the custom of express companies to issue such passes as were there in question was one of long standing and presumably known to Congress; that there was no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited; that there was no direct or express prohibition in the statute, but, on the contrary, the Interstate Commerce Act recognized and always had recognized that the granting of similar privileges to the officers and employees of railroad companies was consistent with sound public policy. (p. 523.) And this Court stated in its opinion that the facts were not seriously in dispute, and showed that it had been the custom of express companies for many years to issue franks such as were embraced in the proceeding. (p. 529.) But this Court held that, in view of the all embracing prohibition of the Act, it could not be doubted that the transportation of property, such as was shown in that case, upon franks issued by the express companies, was within the terms of the Act. If the practice could be deemed to be lawful, the Court said that the right must be founded upon some exception incorporated in the statute. The Court found no such exception and gave effect to the Act according to its terms.

Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of those who conducted the transactions of the past may be considered but it does not justify the continuance of the practice.

We are of the opinion that the action of the Commission of November 4, 1929, was within its authority. For such reasons we conclude that the Commission had power to refuse to issue the order as to passes in the manner provided by the order of June 30, 1925.

*Decree affirmed.*

Mr. Justice M. Reversing and Mr. Justice S. dissenting are of opinion that the decree of the court below should be reversed.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*